JUL 19 1974

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

_____ Term, 1974

No. 73-2044

SHIRLEY KARP, Individually, as Executrix of the Estate of Haskell Karp, and as next friend of Joel Karp and Martin Karp, Minors, and Harry Michael Karp,
*Petitioners,*

v.

DENTON A. COOLEY and DOMINGO S. LIOTTA,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioners Shirley Karp, Individually, as Executrix of the Estate of Haskell Karp, and as next friend of Joel Karp and Martin Karp, Minors, and Harry Michael Karp, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 26, 1974.

## OPINION BELOW

The appendix includes the published opinions of the Fifth Circuit Court of Appeals (493 F.2d 408, rendered April 26, 1974) and the District Court for the Southern District of Texas (349 F. Supp. 827, rendered October 18, 1974).

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 26, 1974. A timely petition for rehearing *en banc* was denied on June 11, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

## QUESTIONS PRESENTED

1. Whether the misapplication of a state statute to sustain the quashing of a subpoena of the investigative records of the Baylor College of Medicine, a third party not involved in the controversy, prevented Petitioner from due process of law in obtaining evidence which would *impeach* respondents and establish probable negligence and fraud under Petitioners' cause of action.

2. Whether due process of law is denied by a federal trial judge denying Petitioners the right to call Dr. Michael DeBakey to testify as a *lay witness* and expert witness to establish a prima facie case of medical malpractice against Dr. Denton Cooley, merely because the Court wanted "to minimize the increasing publicity of the trial" due to the previous world-wide medical controversy between the two "renowned heart surgeons" over the first use of a mechanical heart in a human being,

which Dr. DeBakey classified as "purely experimental and unnecessary".

3. Whether petitioners' Seventh Amendment rights to a jury trial on "fraud in obtaining consent to surgery" was denied by a directed verdict because the Court took judicial knowledge of the "credibility" of Dr. Denton Cooley, a public figure, to the exclusion of Mrs. Karp's credibility, on disputed fact issues.

## STATUTORY PROVISIONS INVOLVED

1. Fourteenth and Seventh Amendments to the Constitution of the United States of America.

2. Article 4447d, Section 3, Vernon's Annotated Civil Statutes of Texas. (Appendix page 11)

## STATEMENT OF THE CASE

This is a case of first impression in medicine and law, involving the first clinical use of a mechanical heart in a human being. The Karp-Cooley-DeBakey controversy over the "experimental use" of this device evoked bitter national debate between medical and legal authorities as to necessary safeguards against human experimentation.

Petitioners' case hinges on disputed facts as to whether Mr. Karp was "defrauded" into consenting to heart surgery, so as to allow Dr. Cooley to use the experimental device, and whether Dr. Liotta and Dr. Cooley were negligent in implanting the mechanical heart where its sole purpose was experimentation.

The Petitioner brought this suit in the Southern District of Texas, where the Court instructed a verdict for the

defendants. The judgment of the trial court was affirmed by the Fifth Circuit and a Motion for Rehearing *en banc* was denied.

## REASONS FOR GRANTING A WRIT

### 1. Misapplication of a State Statute.

This incident attracted worldwide attention and a committe was formed by Baylor College of Medicine to investigate the "theft" of the device from Baylor by Drs. Liotta and Cooley, and to determine whether the guidelines of the National Heart Institute had been followed. The record is undisputed that the mechanical heart used in Haskell Karp was developed with funds from the National Heart Institute and that the guidelines for "experimental" projects involving human beings were not followed.

These records were subpoenaed by Petitioners. The Court quashed the subpoena and refused to allow a bill of exception or allow Petitioners' counsel the right to examine the records, but later made the records available for "appellate purposes only". (see order in Appendix)

The Court prevented use of these records as evidence under a *misapplication* of the following state statute, Article 4447d, Section 3:

> "The records and proceedings of any hospital committee, medical organization committee or extended care facility committee established under state or federal law or regulations or under the by-laws, rules or regulations of such organization or institution shall be confidential and shall be used by such committee and the members thereof only in the exercise of the proper functions of the committee and shall not be public records, and shall not be available

> for court subpoena; *provided, however, that 'nothing herein shall apply to records made or maintained in the regular course of business by a hospital or extended care facility.'* No physician, hospital, organization, or institution furnishing information, data, reports, or records to any such committee with respect to any patient examined or treated by such physician or confined in such hospital or institution shall, by reason of furnishing such information, be liable in damages to any person. No member of such a committee shall be liable in damages to any person for any action taken or recommendation made within the scope of the functions of such committee if such committee member acts without malice and in the reasonable belief that such action or recommendation is warranted by the facts known to him."

It is the position of the Petitioner that this statute is unconstitutional because it denies Petitioner, and other plaintiffs, the right to factual testimony concerning any alleged malpractice where the incident has been the subject of some medical committee investigation.

The Court incorrectly applies Article 4447d (3), V.A.C.S. (1969). A detailed reading of this Article reflects that it was never a legislative directory forbidding the discovery of records of medical organizations and hospitals where such records may be material to an issue in a lawsuit. The statute clearly indicates the legislative purpose of exclusion of certain records to enable organizations to provide the "State Department of Health with data on conditions and treatment of persons" in connection with the identification of persons who "may be in need of immunization," and stating "the identity of any person whose condition or treatment has been conducted shall be confidential and shall not be revealed under any circumstances except in the case of an immunization survey."

Further, Section 3 provides *an exception* that *"nothing herein shall apply to records made and maintained in the regular course of business by a hospital or extended care facility."* It is obvious these records were made in the course of business of Baylor Hospital in investigating the theft of the prosthesis and its use for human experimentation in the Karp case.

To permit the secreting of this investigation under the pretext that Article 4447d forbids the disclosure of these records is to "thwart" justice by excluding evidence under a statute which was never intended to cover the situation involved in this case. To the contrary, the legislation expresses an intention to keep secret only the names of persons who obtain medical assistance for such as venereal disease, or other communicable diseases, so as to avoid embarrassment from these records being made public, and so that the State Department of Health may be adequately informed concerning necessity for immunizations in given localities. It is a legislative act to prevent "public disclosure" of the names of persons seeking "immunization" from diseases, its purpose being to "encourage" persons to seek help from diseases which would hold a person up to public ridicule.

Finally, the Court incorrectly states the documents in the Baylor investigation records "consists only of a draft of a report and the summary of statements of witnesses." (493 F.2d page 426). To the contrary, the records contain *an affidavit of Dr. Liotta* that the pump was not ready for clinical use, and the admission that "we were not planning to implant this in a human being. He was on the table when Dr. Cooley decided it." The affidavit could have been used to directly impeach Dr. Cooley.

**2. Error in refusing Petitioner the right to call Michael DeBakey as an expert and lay witness in open court amounted to prejudicial error and probable judicial coercion of a witness and denied the Petitioner her day in Court, and her rights under the 14th Amendment.**

The Fifth Circuit finds that Dr. DeBakey's testimony is material as to the experimental nature of the device, but concludes his testimony could not have established proximate cause. (493 F.2d, page 424)

Dr. DeBakey's testimony, "from all four corners," established that in his review of the facts and the operative reports of *the Karp surgery* that he concluded the pump was not ready for human use; that in reasonable probability it would jeopardize the life of the individual; and, that the animals tested with this type of device had developed "pulmonary congestion" (pneumonia) with a renal shut-down. That in "his review of the Karp surgery" that where there is a risk in the wedge repair, that the surgery should be delayed "until we could find a donor" as a backup, which Cooley failed to do.

Any privilege Dr. DeBakey had to avoid his involvement as a lay and expert witness was "waived" by his voluntary appearance for deposition as a witness in the case.

The trial court's "in-chamber" judicial coercion of Dr. DeBakey to prevent the calling of him as a witness in open court "to minimize the increasing publicity of the trial" because of the previous world-wide medical controversy between these renowned heart surgeons over the alleged "theft" of the device by Dr. Cooley and the "human experimentation" issues, effectively prevented Petitioners from proving a prima facie case on the negligence action.

An expert may be compelled to testify to matters involving professional opinion where he has "voluntarily" submitted himself to previous examination as a witness in a case. 97 C.J.S., Sec. 27b(4), page 407.

**3. Judicial determination of the credibility of Dr. Cooley on issue of fraud denied Petitioner's right to a jury trial under the Seventh Amendment.**

The Court's holding that the written consent is the best evidence of what Mr. Karp was advised is illogical, since the *only statement in the written consent* about risk is, "The risk of this surgery has been explained to me." This is obviously a general statement without substance or facts as to "what" knowledge Karp had as to the risks involved. The only way this factual dispute can be determined is by the jury resolving the disputed testimony of Mrs. Karp, Cooley and Witkin as to what information was imparted to Mr. Karp.

This holding ignores the jury's right to resolve *conflicts in testimony* as to the "risk of unsuccessful repair." For example, Dr. Cooley states there was a 30% chance of failure; Rabbi Witkin states Karp told him there was an 80% chance of failure; and, Mrs. Karp stated Cooley told her "in the presence of her husband" that there was less than a 5% risk of failure because of Cooley's expertise in wedge section repairs. Common sense allows determination of whether Karp had been properly informed as to the "risk factor," and whether this was a material inducement to any surgery.

This opinion sets a dangerous legal precedent because it effectively denies "a remedy" (informed consent) where the patient dies as a result of surgery. The Court holds

there is no evidence "that Mr. Karp *would not have consented* to the procedure;" and, therefore no proof of causation. Obviously, since Mr. Karp died there could be no evidence from the patient. However, this is not an obstacle to proximate cause under the "objective" consent rule. The Court also ignores the testimony of Mrs. Karp that her husband *would not have consented to any type surgery* if Dr. Cooley had fully advised as to details of the risks and nature of the alternative procedures.

Factual disputes also exist over two material elements of the consent itself: (1) *Need for immediate surgery:* Mrs. Karp stated that Dr. Cooley advised the "aneurysm is about to burst. If we wait too long there will be nothing to repair." On the other hand, Cooley states he had never seen an aneurysm burst, and he had never told anyone that an aneurysm could burst. (2) *Availability of donor heart:* Cooley claims he advised Karp that no heart donor was available, but that the device would sustain life until they could get a transplant. To the contrary, Mrs. Karp states that Dr. Cooley told her "in the presence of Mr. Karp" that "there is a donor heart that will be available and that we will use if there is that need for it." If this is "a three-stage procedure" then obviously the donor heart was highly material to the consent.

The Court concedes in its opinion that the better reasoned rule on informed consent as to causation is the "objective rule." The objective rule, according to one of the articles cited by the Court, N.Y.U.L. Rev., Vol. 48, June 1973, at page 550, is stated in simple terms:

> "Whether the average prudent person in plaintiff's position, informed of all material risks, would have foregone treatment (objective view)."

In short, plaintiff's testimony as to his state of mind in light of risk stated or unstated by the physician is not determinative; but, to the contrary, it is exclusively the province of a jury to determine whether reasonable persons in this position would have accepted or refused the surgery in light of what was and what was not told about the risks, complications, and alternative remedies available.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of July, 1974, three copies of the Petition for Writ of Certiorari and Appendix were mailed, postage prepaid, to Thomas Weatherly of Vinson, Elkins, Searls, Connally & Smith, First City National Bank Building, Houston, Texas, and A. J. Watkins, Watkins and Hamilton, The Main Building, Houston, Texas, Counsel for Respondents. I further certify that all parties required to be served have been served.

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*Counsel for Petitioners*

## APPENDIX A

Art. 4447d. Providing State Department of Health with data on condition and treatment of persons

Section 1. Any person, hospital, sanitorium, nursing or rest home, medical society, cancer registry, or other organization may provide information, interviews, reports, statements, memoranda, or other data relating to the condition and treatment of any person to the State Department of Health, persons or orgnizations making inquiries pursuant to immunization surveys conducted under the auspices of the State Department of Health, medical organizations, hospitals and hospital committees, to be used in the course of any study for the purpose of reducing morbidity or mortality, or for the purpose of identifying persons who may be in need of immunization, and no liability of any kind or character for damages or other relief shall arise or be enforced against any person or organization by reason of having provided such information or material, or by reason of having released or published the findings and conclusions of such groups to advance medical research and medical education, or by reason of having released or published generally a summary of such studies.

Sec. 2. The State Department of Health, medical organizations, hospitals and hospital committees shall use or publish said material only for the purpose of advancing medical research or medical education in the interest of reducing morbidity or mortality, except that a summary of such studies may be released by any such group for general publication. The identity of any person whose condition or treatment has been studied shall be confidential and shall not be revealed under any cir-

cumstances except in the case of immunization surveys conducted under the auspices of the State Department of Health for the purpose of identifying persons who may be in need of immunization. With the exception of immunization information, all information, interviews, reports, statements, memoranda, or other data furnished by reason of this Act and any findings or conclusions resulting from such studies are declared to be privileged.

Sec. 3. The records and proceedings of any hospital committee, medical organization committee or extended care facility committee established under state or federal law or regulations or under the by-laws, rules or regulations of such organization or institution shall be confidential and shall be used by such committee and the members thereof only in the exercise of the proper functions of the committee and shall not be public records and shall not be available for court subpoena; provided, however, that nothing herein shall apply to records made or maintained in the regular course of business by a hospital or extended care facility. No physician, hospital, organization, or institution furnishing information, data, reports, or records to any such committee with respect to any patient examined or treated by such physician or confined in such hospital or institution shall, by reason of furnishing such information, be liable in damages to any person. No member of such a committee shall be liable in damages to any person for any action taken or recommendation made within the scope of the functions of such committee if such committee member acts without malice and in the reasonable belief that such action or recommendation is warranted by the facts known to him.

## APPENDIX B

Shirley KARP, Individually etc., et al.,
Plaintiffs-Appellants,

v.

Denton A. COOLEY and Domingo S. Liotta,
Defendants-Appellees.

No. 73-2146

United States Court of Appeals,
Fifth Circuit

April 26, 1974

Medical malpractice action was brought against chief surgeon and assistant surgeon by widow of patient who succumbed following heart surgery. The United States District Court for the Southern District of Texas, at Houston, 349 F. Supp. 827, John V. Singleton, Jr., J., directed verdict and rendered judgment for the surgeons and the patient's widow appealed. The Court of Appeals, Bell, Circuit Judge, held that evidence did not warrant submission to jury of issues of lack of informed consent with respect to the mechanical heart implant, fraud, negligence in the performance of various surgical procedures, negligence based on "human experimentation" or on issues of proximate cause, that the trial court did not abuse its discretion in excluding testimony of thoracic surgeon, that trial court did not abuse its discretion in excluding a motion picture film of portions of the operation, and that certain records of medical school-investigating committee were within statute which protected from subpoena the records and proceedings of any medical organization.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before BELL, THORNBERRY and DYER, Circuit Judges.

BELL, Circuit Judge:

Medical history was made in 1969 when Dr. Denton A. Cooley a thoracic surgeon, implanted the first totally mechanical heart in 47-year-old Haskel Karp. This threshold orthotopic cardiac prosthesis[1] also spawned this medical malpractice suit by Mr. Karp's wife, individually and as executrix of Mr. Karp's estate, and his children, for the patient's wrongful death. Grounded on diversity jurisdiction, and thus Texas substantive law, novel questions concerning experimentation, as well as issues of informed consent, fraud, and negligence are presented. After nine days of trial and numerous ancillary proceedings outside the jury's presence, the district court in a carefully considered opinion directed a verdict for the defendant-appellees, Dr. Denton A. Cooley and Dr. Domingo S. Liotta. Karp v. Cooley, S.D. Tex., 1972, 349 F. Supp. 827. For reason stated herein, we affirm.

## ASSIGNMENTS OF ERROR

There are eleven asserted errors. In assignments one through four, the claim is made that the district court

1. The mechanical heart implant was actually the second stage of a three stage procedure. On April 4, 1969, Dr. Cooley first attempted a ventriculoplasty, or as sometimes termed a wedge excision, or wedge resection. That proved unsuccessful, and it was then that the mechanical heart was implanted in Mr. Karp, where it sustained Mr. Karp for approximately sixty-four hours. A donor heart was then available, and the transplant operation was performed on the morning of April 7, 1969. Mr. Karp died at 4:10 p. m., April 8, 1969, some thirty-two hours after the transplant surgery.

erred in directing a verdict for defendants on appellants' causes of action based on fraud and a lack of informed consent; point five objects to the directed verdict on appellants' claim of fraud, negligence, and gross negligence in the performance of the various surgical procedures; point six is a claim of negligence based on "human experimentation;" point seven claims fraud and negligence in connection with the heart transplant; point eight assigns error in the exclusion of certain records of Baylor Medical School; points nine and ten are objections to the exclusion of Dr. Michael DeBakey's testimony and to alleged in-chambers judicial "coercion;" and point eleven assigns error for the exclusion of a motion picture film of the Karp operation. Because of the nature of the questions presented here, we have outlined the evidence presented at the trial in some detail.

## FACTS

There is no dispute that prior to entering St. Luke's Episcopal Hospital in Houston on March 5, 1969, Haskell Karp had a long and difficult ten-year history of cardiac problems.[2] He suffered a serious heart attack in 1959 and was hospitalized approximately two months because of diffuse anterior myocardial infarction. He had incurred four heart attacks, thirteen cardiac hospitalizations and considerable medical care culminating in the insertion of an electronic demand pacemaker in May, 1968. Subsequent hospitalization in September and October, 1968 occurred, and finally the decision was made to seek the assistance of Dr. Cooley. Mrs. Karp telephoned Dr. Cooley

2. A detailed history is contained in the district court opinion, 349 F. Supp. at 829. This is drawn from the history and physical examination by Dr. A. J. Levine, Defendants' Exhibit No. 5. Mrs. Karp also detailed Mr. Karp's medical history in her testimony.

on March 3, 1969, and it was agreed Mr. Karp would be in Houston by Wednesday, March 5.

## MRS. KARP'S TESTIMONY

[1] Mrs. Karp's testimony in relevant part was that at the time of his hospital admission March 5, Mr. Karp's physical condition was "as normal as any man in the courtroom" and that he was in no pain or discomfort. She testified Dr. Homer L. Beazley, a cardiologist, examined Mr. Karp on March 6 and on a daily basis after that. She said Dr. Cooley first saw Haskell Karp on Tuesday, March 11. She said Dr. Cooley recommended a heart transplant, but that Mr. Karp rejected this suggestion. She said Dr. Cooley next saw Mr. Karp about a week later when he began to talk about a "wedge procedure" and an aneurysm.[3] She then testified that she next saw Dr. Cooley the day before Mr. Karp's surgery on April 3, 1969, although she admitted that Dr. Cooley had seen Mr. Karp the night before on April 2 when she was not present. Mrs. Karp testified Dr. Cooley came into the hospital room about 6:30 or 7:00 p. m. on April 3. As Mrs. Karp described this meeting:

> "When Dr. Cooley came in, he said, 'I have a paper here for you to sign for Mr. Karp's surgery,'[4]

3. Mrs. Karp said Dr. Cooley told Mr. Karp and her that an aneurysm ". . . is like a ballooning out of a section of this [tire tube]. It's like a weak wall. And when you put pressure on it or drive it, it could break open."

4. This consent form was prepared by Dr. Cooley and Mr. Henry Reinhard, Assistant Administrator of St. Luke's Episcopal Hospital, on April 3 especially for the Karp operation. While there is a conflict in the testimony between Mrs. Karp, Dr. Cooley, and Mr. Reinhard as to *when* Mr. Karp signed the form, there is no dispute that Mr. Karp signed it, and that both Mr. and Mrs. Karp's signatures were

and I looked at him, and said, 'Why do you want to operate,' you know, 'tomorrow after keeping us here so long? Can you tell me about it?'

---

verified subsequently by Mr. Reinhard. The consent form reads as follows:

CONSENT TO OPERATION

April 3, 1969

1. I, Haskell Karp, request and authorize Dr. Denton A. Cooley and such other surgeons as he may designate to perform upon me, in St. Luke's Episcopal Hospital of Houston, Texas, cardiac surgery for advanced caridac decompensation and myocardial insufficiency as a result of numerous coronary occlusions. The risk of this surgery has been explained to me. In the event cardiac function cannot be restored by excision of destroyed heart muscle and plastic reconstruction of the ventricle and death seems imminent, I authorize Dr. Cooley and his staff to remove my diseased heart and insert a mechanical cardiac substitute. I understand that this mechanical device will not be permanent and ultimately will require replacement by a heart transplant. I realize that this device has been tested in the laboratory but has not been used to sustain a human being and that no assurance of success can be made. I expect the surgeons to exercise every effort to preserve my life through any of these means. No assurance has been made by anyone as to the results that may be obtained.

* * * * * * * * * *

Signature s/ Haskell Karp
Haskell Karp.

WITNESSES:

s/ Mrs. Haskell Karp
Mrs. Haskell Karp (wife)

s/ Henry C. Reinhard, Jr.
Henry C. Reinhard, Jr.

* * * * * * * * * *

The district court opinion also quotes from the standard consent form signed by Haskell Karp at the time he was admitted to St. Luke's on March 5, but this has no real relevance on informed consent. Luna v. Nering, 5 Cir., 1970, 426 F.2d 95, 98, 99 (Texas law); see also Waltz & Scheuneman, 1970, Informed Consent to Therapy, 64 Nw U.L.Rev. 628, n. 60.

"And he said, 'Mr. Karp has taken a sudden turn for the worse. His aneurysm is about to burst. If we wait too long, we may not be able to get into his heart to repair anything.'

"He says, 'I still don't know whether we can even wait till tomorrow.'

"I said to him, 'You once told me, Dr. Cooley, that . . . you thought he needed a transplant.' I said, 'Do you still think that's the answer.'

"And Dr. Cooley said to me, 'Mrs. Karp, there is a donor heart that will be available and that we will use if there's that need for it.' . . .

"He says, 'Will you sign this now?' And I looked at my husband, and I guess he was in tears because I was shaking. And Dr. Cooley said to me, 'don't worry about the shock element to your husband because I told him exactly what I told you now last night.'

"So then my husband said, 'Honey, he told me this last night.' He said, 'Go ahead. We'll sign the agreement.'

"And that's what happened. My husband signed it—— . . . Then he gave it to me to sign. And I says, 'I got to read it first.'

"And I started to go down it and I was glancing at the—it was all to bewildering and all of a sudden I came across some sort of a mechanical device, and I said, 'Dr. Cooley, what's thing thing here that you have?'

"I said, 'what's mechanical device?'

"And he said, 'well you know, Mrs. Karp, when we operate on a heart we have to take the heart out of the body. So what we do is use what's commonly known as a heart lung machine and we attach the pipes from the machine to the different arteries that

they sever to take the heart out. And this here keeps the flow of blood going through the body and the oxygen so that there will not be any damage to the body.'

"So he says the reason that he put that into the consent was because the one that they had in the operating room, I believe he said, worked for a matter of maybe two hours or something and this here one was a new model and it was proven in the laboratory, but he [sic] hasn't been used on a human being yet. But that this here should sustain him if he should die on the table. He says it would sustain him for at least thirty minutes in order to get the donor heart into my husband's body."

Mrs. Karp also testified that Dr. Cooley did not state that the device was any different from the heart-lung device ordinarily used for open heart surgery, stating that it was a "newer model" that had not been used before. She said Dr. Cooley told her there was a donor heart available in a nearby hospital, and that the mechanical device would be used only 30 minutes while the donor was being prepared. Mrs. Karp said Mr. Reinhard came to the room early the next morning to verify the signatures. She also testified that Mr. Karp at the time of the April 3 meeting with Dr. Cooley was as normal as when he entered the hospital, that his physical appearance was the same and there was no appearance of pain; and that Mr. Karp was able to walk around the hospital even the morning of the operation. She said both Dr. Beazley and Dr. Cooley had said the wedge excision had a 70 per cent chance of success, and that Dr. Cooley had said that in his own personal experience he had less than a five per cent chance of failure and that it "seemed like it hardly ever failed."

## 20

## DR. COOLEY'S TESTIMONY

Dr. Cooley testified that he first saw Mr. Karp on or about March 5, 1969 and that he recommended a heart transplant which Mr. Karp rejected, preferring "some alternative procedure." Dr. Cooley said tests then showed Mr. Karp had triple vessel disease where all three coronary arteries were occluded. He said electrocardiograms showed evidence of extensive scarring and damage and that his chest X-rays showed enormous cardiac enlargement. In addition, said Dr. Cooley, he had a pacemaker which was about to fail. Dr. Cooley said he estimated that Karp's chances of dying in the operating room as a result of the wedge procedure were approximately thirty per cent. He testified that as some three weeks passed, Mr. Karp grew increasingly impatient waiting for a donor's availability in the event the wedge excision failed. Dr. Cooley said it was the custom of medical doctors in the community to advise a patient of risks of surgery "within certain boundaries. . . . but not every contingency can be explained to a layman about the threat and the risk of open heart surgery or the type of device which we are using, many of which are being used for the first time in a patient." About a week before the operation of April 4, 1969, Dr. Cooley said he began to discuss with Mr. Karp the possibility of another alternative "which I did not think was proper when he initially came to the hospital."

> "I told him we had no heart donor available, had no prospect of one . . . I told him that there was a possibility that we had a device which would sustain his life in the event that he would die on the operating table. We had a device which would sustain his life, hopefully, until we could get a suitable donor.

> I had told him that I did not know whether it would take a matter of hours or days, weeks, or maybe not at all, but it would sustain his life and give us another possibility of salvaging him through heart transplantation."

Dr. Cooley said he did not recall who was present when these discussions began. Dr. Cooley described his discussion of this device:

> "I told him that it was a heart pump similar to the one that we used in open-heart surgery; that it was a reciprocating-type pump with the membrane, in which the pumping element never became in contact with the bloodstream; that it was designed in such a manner that it would not damage the bloodstream or it would cause minimal damage to the bloodstream; that it would be placed in his body to take over the function of the dead heart and to propel blood throughout his body during this interim until we could have a heart transplant. [Tr. 261]. . . . I told him this device had not been used in human beings; that it had been used in the laboratory; that we had been able to sustain the circulation in calves and that it had not been used in human beings. It had been used on the bench in what we call in vitro experiments, in vitro as opposed to in vivo. In vivo means using it in live or experimental animals. In vitro means using it in some type of testing device where you test the hydraulic factors concerned with the pump. I told him it had been tested in the laboratory, it had not been used in a human being, but I was confident that it would support his circulation. . . . I told him that we had been successful in keeping an animal alive for more than forty hours with the device, but that this was a calf. It was a 300-pound animal in which the demands on the pump were far greater than would be in the human

> body, and that I was reasonably confident that this device would sustain his life until we could get a heart transplant. But no guarantees were made at all."

Dr. Cooley admitted he and Mr. Karp did not discuss the number of animals in which the device had been tested, nor whether the animals sustained damage to their bodies by the use of this pump.

Asked by appellants' counsel whether he described it as a heart-lung pump similar to that used in other open heart surgeries, Dr. Cooley said, "I told him it was a pump. I didn't tell him it was a lung. I told him it was an artificial heart, that it was a pump which would replace temporarily the heart."

Dr. Cooley said he next discussed the operation with Mr. Karp the evening of April 2, 1969 at approximately 10.30 p.m. Dr. Cooley said he assured himself that Mr. Karp understood the gravity of his personal situation and the nature of the operation to be performed. Dr. Cooley said he does not recall whether Mrs. Karp was present during these conversations, and added that he was not present when Mrs. Karp signed the consent form and that he did not witness the signing of the consent form.

## DR. HOMER L. BEAZLEY

While at St. Luke's Hospital as Dr. Cooley's patient, Haskell Karp was examined and treated on numerous occasions by Dr. Homer L. Beazley, a cardiologist. Based upon his examination of Mr. Karp, Dr. Beazley expressed the firm belief that Mr. Karp was "totally disabled," would be unable to return to his employment without surgery; and was a suitable candidate for wedge resection

surgery.[5] Dr. Beazley had generally discussed various surgical procedures with Mr. Karp including the possibility of a heart transplant, but Mr. Karp desired to have the wedge resection or excision of diseased heart muscle attempted as the initial procedure.

## RABBI NATHAN WITKIN

On April 2, or two days prior to surgery, Mr. Karp sent for Rabbi Nathan Witkin, who had counseled with Mr. and Mrs. Karp virtually every day since the day Mr. Karp entered St. Luke's. According to Rabbi Witkin's testimony, Mr. Karp told the Rabbi that he was a very sick man, his only hope was surgery, and the odds of his surviving surgery were not favorable. On direct examination Rabbi Witkin said Mr. Karp told him the chances of surviving surgery were 70 per cent against him. He said that if he did not survive surgery a mechanical heart would be implanted in him. Rabbi Witkin said Mr. Karp told him that while he had originally opposed a transplant, he now agreed that if his condition became so serious on the operating table with the possibility of death that he would accept a mechanical heart with the prospect of a subsequent transplant. He said that Mrs. Karp never led him to believe that she had any contrary understanding. The Rabbi said Mr. Karp was "proud" he would be the first human to "experience such a device." On cross-examination the Rabbi corrected himself to remember that Mr. Karp had told him that the odds were 80-20 against him rather than 70-30. The Rabbi

5. As is discussed *infra*, appellants sought to argue that negligence was demonstrated on the informed consent issue from Dr. Cooley's not telling Mr. Karp of a notation made by Dr. Beazley on March 6, 1969 that said, "I am not completely sold that he is a candidate for surgery."

said that he at no time found Mr. Karp upset and that Mrs. Karp was calm at all times.

## MR. HENRY REINHARD

Mr. Henry Reinhard, Assistant Administrator of St. Luke's Hospital, said that he first met Haskell Karp on Thursday April 3 in the mid-afternoon. He said no one else was then present and the purpose of his visit was to attest to Mr. Karp's signature on the consent form and review its contents with him. Asked whether Mr. Karp had already signed the form when he went to Mr. Karp's room Mr. Reinhard said, "As I recall, he had, yes, sir." Mr. Reinhard also said Mrs. Karp's signature was already on the consent form at that time. After having been prepared in his office Thursday morning, Mr. Reinhard said he delivered the consent form to Dr. Cooley's office late that morning. He said that in the early afternoon on April 3 Dr. Cooley got word to him that Mr. Karp had signed it and that the doctor wanted Mr. Reinhard to review it.

Dr. Keats, the anesthesiologist, said that he talked with both Mr. and Mrs. Karp the morning of the operation. Dr. Keats testified that he made inquiry whether Mr. Karp understood the nature of the surgical procedure and whether it had been explained to him to his satisfaction and offered to answer any questions. According to Dr. Keats, Mr. Karp had no questions.

## THE OPERATION

According to the anesthesia record (Plaintiffs' Exhibit I), Mr. Karp was brought into the operating room at about 1:15 p.m. When Dr. Keats saw Mr. Karp at that time he believed Mr. Karp's death to be imminent. Dr.

Keats said Mr. Karp was in great distress; he was having difficulty breathing, shortness of breath and he was pale and sweating. Dr. Keats said he hurriedly got Mr. Karp on the operating table, started giving him oxygen, and put him to sleep as rapidly as possible so that they could put a tube in his windpipe to assist his breathing. Dr. Keats then sent word to Dr. Cooley that they "had better go ahead with the operation as expeditiously as possible, otherwise the patient may not last long enough to have the operation." Dr. Cooley testified that when Mr. Karp was brought to the surgical hallway before the operation he was completing another patient's open heart surgery. He says he was told by someone that Mr. Karp was at that time near death and he proceeded to complete the other surgery which he said took about 20 minutes. Dr. Cooley says Mr. Karp was near death when he entered the operating room, "mottled and blue." He said he felt Mr. Karp was "virtually moribund" at that time.

The operation was then begun with Dr. Cooley as chief surgeon, Dr. Liotta as first assistant, Dr. Grady Hallman as second assistant, and Dr. Keats as anesthesiologist. Dr. Cooley testified that when he entered the operating room Karp was being given oxygen by mask. He said that he opened the pericardium and that as a result of very feeble heart action the heart pump was started as quickly as possible. Dr. Keats remembers that as Mr. Karp's heart became visible "it was a very large heart that filled the entire surgical field." Dr. Cooley said that the heart was functioning very feebly, was virtually non-contractile and could not support Mr. Karp. After Mr. Karp had been on the heart-lung or heart oxygnator a sufficient time to get his heart going again an incision was made in the left ventricle. Dr. Cooley said that Mr.

Karp had scar tissue circumferentially around the inside of his left ventricle, that his entire interventricular septum was one solid piece of scar tissue, the anterior ventricle was almost completely displaced by scar tissue, and there was an aneurysm on the posterior aspect of the ventricle. Dr. Cooley said that the only normal appearing muscle was in the papillary muscles of the mitral valve, but they have nothing to do with the left ventricular output.

Although Dr. Cooley said the situation was then "virtually hopeless," he began to do what he could with the resection procedure.[6] He excised the most severely damaged part of the ventricular myocardium in his repair of the left ventricle. Because of the extensive scarring it was necessary to excise part of the right ventricle. In completing this complicated repair it was then necessary to sew the partition back to the right ventricle, and sew the left ventricle back to them. Dr. Cooley said that Mr. Karp did not have an anterior aneurysm but that the anterior myocardium was diffusely dilated. He added that it was very difficult to differentiate between a dilated scarred heart and an aneurysm. He described the nonfunctioning large area on the left ventricle as having a paradoxical motion and a ballooning out effect. He compared the size of the balloon to a cantaloupe. He said there was no threat of break or rupture in lesions like this; that he had never seen one rupture; and that he never told a patient a ventricular aneurysm would burst.

6. Dr. Cooley states the wedge resection would have been beneficial, "but at the time of operation, we discovered a situation for which wedge resection could not be beneficial. But since we were under this obligation, I felt a moral obligation to try. We tried the wedge procedure and it failed. He ostensibly died on the operating table, so we proceeded with the alternate."

It is to be noted here that although Mrs. Karp testified her husband had appeared normal on the day of the surgery, there is no lay or expert testimony other than that Mr. Karp was near death at the time of the operation.

According to Dr. Hallman, the repair described above was done in the manner that cardiovascular surgeons normally go about performing this operation. However, Dr. Hallman said that due to the extensive scarring of the heart, there simply was not sufficient healthy heart muscle remaining to form an efficient pump to support Mr. Karp's life. Dr. Hallman, Dr. Keats and Dr. Cooley all testified that at this point, that is after the attempted resection, Mr. Karp was again faced with imminent death.

[2] Dr. Cooley said that it took about 20 minutes to make the resection repair.[7] He said that after the repair the clamp was taken off the ascending aorta to attempt to restart the myocardium. He stated that there was fibrillation and that he attempted an electrical countershock at least once.[8] He stated that there was a sinus

7. Dr. Keats testified from the anesthesiology record that the wedge excision took seven minutes.

8. Dr. Cooley said the electrical shock stopped the fibrillation, a sinus type of a nodal rhythm then began, but the rhythm contraction was too weak to support Mr. Karp's life. Dr. Keats said he believed more than one shock attempt was made, basing this on both memory and the anesthetic record that three attempts were made during this time period immediately after the wedge excision to take Karp off the heart-lung by-pass. Dr. Keats confirmed that the shock restarted the beat, but not the heart's pumping action. Apparently one of the plaintiffs' theories of negligence, and also asserted as one of the circumstantial factors supporting the experimentation count, was an alleged lack of medical effort on Dr. Cooley's part to revive Mr. Karp after the wedge resection. Appellants' theory has no evidentiary foundation.

type or nodal rhythm at that point but that the rhythm contraction was too weak to support life due to the fact that there simply was too much scar tissue in the heart. Dr. Hallman testified that some thirty minutes elapsed between the end of the repair and the decision to remove the heart. Mr. Karp's heart was then removed and the mechanical device was inserted. Dr. Cooley said that the mechanical heart functioned very well and Mr. Karp responded to stimulation within 15 or 20 minutes after the incision was closed. His blood pressure was well sustained according to Dr. Cooley and he showed signs of cerebral activity. Dr. Keats said that Mr. Karp was amazingly well following the operation, that the records reflect that he was responding reasonably to commands within 20 minutes postoperatively. Dr. Keats testified that the endocracheal tube was removed about 1:20 a.m., and that he saw Mr. Karp some time the next morning at which time he was responsive and could communicate.

After the mechanical heart had been inserted, Dr. Cooley said he went to Mrs. Karp and told her that the wedge procedure had been unsuccessful; that he had proceeded with the use of the mechanical device and that they were going to try to get a donor. The transplant operation was performed on the morning of April 7, 1969, approximately 64 hours after the mechanical device had been implanted in Mr. Karp. He died the next day, April 8, 1969, some 32 hours after the transplant surgery.

## DR. JOHN D. MILAM

Dr. John D. Milam, a pathologist who participated in both the pathological examination of Mr. Karp's diseased heart and the autopsy performed on Mr. Karp, testified

that in reasonable medical probability the immediate cause of Mr. Karp's death was pneumonia, and the secondary or contributing factor was renal failure. In testifying about the "cause of the causes," Dr. Milam said that the cause of the pneumonia was a germ or bacteria called pseudomonas, which he said was a type of pneumonia that has shown up in other patients undergoing heart transplants as well as non-transplant and non-cardiovascular patients. He said that the cause of the renal dysfunction could have been either a state of shock as a result of the surgery, an infectious process such as pneumonia, the use of the heart-lung machine, or the mechanical heart. Dr. Milam said that because of the rarity of hemoglobin casts in Mr. Karp's kidney tubules, the mechanical heart and heart-lung bypass were less likely causes of the renal shutdown than shock or pneumonia. Based on his examination of Mr. Karp's heart, Dr. Milam said that Mr. Karp would have died in a few hours.

## DR. DONALD ROCHELLE

Dr. Donald Rochelle, a cardiologist who first examined Karp some two hours after the transplant, and who also observed the autopsy, said at that initial examination Karp was critically ill with two major problems, pneumonia and renal failure. Dr. Rochelle also expressed the opinion the chief or primary cause of Mr. Karp's death was pneumonia, and he felt that the renal problem was a contributing or weakening factor. He said that it was "possible" that the renal failure was a result of the first surgery while Karp was on the heart-lung machine, or that the mechanical heart could have been a contributing factor. Asked how long damage to the red blood cells

could exist before it became irreversible, Dr. Rochelle said it could exist for a long time—10 days to a month and still become reversible. Dr. Rochelle said there was some damage to the blood caused by the mechanical device. He said the record indicated the rate of blood cell destruction was measured frequently while the mechanical heart was in place, and the longer the mechanical device was in Karp, the rate and severity of the blood cell destruction diminished as the innerlining of the mechanical device became coated with a substance mimicking the interior of blood vessels and the heart. He said that "some" of the renal shutdowns was caused by damage to the blood.

## THE PROSTHESIS

The record is virtually undisputed that the mechanical heart inserted in Haskell Karp was prepared by Dr. Liotta at the Baylor laboratories. Ms. Susan Anderson, a lab technician at Baylor, described her work on this heart pursuant to Dr. Liotta's instructions. She testified that they had been making this type of pump in the lab for some six to eight months. She was not sure whether she actually made the same pump used in Haskell Karp but said it was the same type. She said several of the pumps of different sizes were made at Dr. Liotta's request one month before the Karp surgery. She said that Dr. Liotta had the composition of the mechanical device changed some three or four weeks before the Karp surgery, such as smoothing ragged inflow edges. She said that these pumps were the same type that were used in the Baylor experiments although the valves were tied more securely and they had a velour lining.

Asked by plaintiff's counsel whether Dr. Michael DeBakey was developing a similar type pump, Dr. Cooley said Dr. DeBakey had used a univentricular pump that Dr. Cooley said carried only about 30 per cent of the circulation. Dr. Cooley said that he and Dr. Liotta had designed the biventricular pump used in Mr. Karp at St. Luke's. Dr. Cooley said that the mechanical device was tested in seven calves in the Baylor labs as well as in vitro [lab] experiments. Dr. Cooley said that he could not testify as to some of the details of these last three calf experiments because his notes were confiscated by Dr. DeBakey, but said that the results of all three experiments were encouraging. He said the third calf experiment was the most gratifying of all because "it demonstrated conclusively that the device was efficient and deserved application in humans." Dr. Cooley said he did not recall what either the first or second calf died from, how long they lived, whether there was urinary output, or whether the calves were able to eat or stand up. He said he recalled there was some urine output in the third calf, although it was low.

We first affirm the district court's directed verdict for defendants on the issues of informed consent and fraud.

## INFORMED CONSENT

[3, 4] Suits charging failure by a physician adequately to disclose the risks and alternatives of proposed treatment are not innovations in American law. They date back a good half-century,[9] and in the last decade have in-

9. *See, e. g.*, Hunter v. Burroughs, 1918, 123 Va. 113, 96 S.E. 360 (dictum), where the court affirmed a judgment for plaintiff based on a finding of sufficient evidence to support the finding of negligent treatment without having to rule upon the issue of informed consent; Theodore v. Ellis, 1917, 141 La. 709, 75 So. 655. The modern

creased in number. The courts and commentators[10] have not been in agreement on the substantive requirements or the nature of the proof required,[11] but the Texas requirements are reasonably well-settled and stringent.

[5-8] The root premise jurisprudentially is that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . . [12] Physicians and surgeons have a duty to make

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development is generally recognized as beginning with Natanson v. Kline, 1960, 186 Kan. 393, 350 P.2d 1093, on rehearing. 187 Kan. 186, 354 P.2d 670. *See* Waltz & Scheuneman, 1970, Informed Consent to Therapy, 64 Nw. U.L.Rev. 628, 635-36, n. 25, for a collection of cases.

10. *E. g.*, Note, Informed Consent—A Proposed Standard for Medical Disclosure, 1973, 48 N.Y.U.L.Rev. 548; Note, Informed Consent as a Theory of Medical Liability, 1970 Wisc.L.Rev. 879; Note, Failure to Inform as Medical Practice, 1970, 23 Vand.L.Rev. 754. For an exhaustive compilation of commentary on the doctrine of informed consent, see Waltz & Scheuneman, 1970, Informed Consent to Therapy, 64 Nw. U.L.Rev. 628, n. 1.

11. As discussed *infra*, the majority rule, to which Texas subscribes, compels a physician to disclose facts which a reasonable medical practitioner in a similar community and of the same school or medical thought would have disclosed to his patient regarding the proposed treatment. Since it is said only doctors are competent to testify about medical customs, majority rule jurisdictions require the plaintiff to introduce expert testimony to establish the doctor's duty to disclose. *See* Note, Informed Consent—A Proposed Standard for Medical Disclosure, *supra*, note (10), 48 N.Y.U.L.Rev. at 552-53.

A "minority" rule has developed requiring disclosure of all "material" information which a reasonable man in the situation which the physician knew or should have known to be the plaintiff's would deem significant in making a decision to undergo the recommended treatment. *See e. g.*, Canterbury v. Spence, 1972, 150 U.S.App.D.C. 263, 464 F.2d 772; Riedinger v. Colburn, D.Idaho, 1973, 361 F.Supp. 1073 (Idaho law); Cobbs v. Grant, 1972, 8 Cal.3d 229, 104 Cal.Rptr. 505, 502 P.2d 1.

12. Schloendorff v. Society of New York Hosp., 1914, 211 N.Y. 125, 219, 105 N.E. 92, 93 (Cardozo). See W. Prosser, Law of Torts, § 18 and § 32, at 105-06 and 165-66 (4th ed. 1971).

a reasonable disclosure to a patient of risks that are incident to medical diagnosis and treatment. Scott v. Wilson, Tex. Civ. App. 1965, 396 S.W.2d 532, aff'd, Wilson v. Scott, Tex. 1967, 412 S.W.2d 299, 301. True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgably the options available and the risks attendant upon each.[13] From these general principles, however, the focus in each individual case must necessarily relate back to what the physician said or failed to say and what the law requires him to say.[14]

[9, 10] The Texas standard against which a physician's disclosure or lack of disclosure is tested is a medical one which must be proved by expert medical evidence of what a reasonable practitioner of the same school of practice and the same or similar locality would have advised a patient under similar circumstances. Wilson v. Scott, *supra*, 412 S.W.2d at 301-304. Quoting from and with approval of Aiken v. Clary, Mo. 1965, 396 S.W.2d 2d 668, 674, the Texas Supreme Court said in *Wilson*:

> "The question to be determined by the jury is whether the defendant doctor in that particular situ-

13. See Canterbury v. Spence, *supra* note (11), 464 F.2d at 780 n. 13 (and cases cited).

14. *Id.* at 780 n. 15. The doctrinal label "informed consent" has been criticized for its emphasis on the patient's understanding and consent rather than the central issue, the physician's duty to inform the patient of the risks and consequences involved in the contemplated procedure. This has been said to result from the doctrine's original development from a battery theory rather than the more currently accepted theory of negligence. *See* Scott v. Wilson, Tex.Civ. App. 1965, 396 S.W.2d 532 (battery theory), aff'd, Wilson v. Scott, Tex. 1967, 412 S.W.2d 299 (negligence theory). *See also* Note, Informed Consent as a Theory of Medical Liability, *supra*, note (10), 1970 Wisc.L.Rev. at 887 and n. 55.

> ation failed to adhere to a standard of reasonable care. These are not matters of common knowledge or within the experience of laymen. Expert medical evidence thereon is just as necessary as is such testimony on the correctness of the handling in cases involving surgery or treatment . . . 'Without the aid of expert medical testimony . . . a jury could not, without resorting to conjecture and surmise or by setting up an arbitrary standard of their own, determine that defendants failed to exercise their skill and use the care exercised by the ordinarily skillful, careful and prudent physician acting under the same or similar circumstances' . . . The question is not what, regarding the risks involved, the juror would relate to the patient under the same or similar circumstances, or even what a reasonable man would relate, but what a reasonable *medical practitioner* would do. Such practitioner would consider the state of the patient's health, the condition of his heart and nervous system, his mental state, and would take into account, among other things, whether the risks involved were remote possibilities or something which occurred with some sort of frequency or regularity. This determination involves medical judgment as to whether disclosure of possible risks may have such an adverse effect on the patient as to jeopardize success of the proposed therapy, no matter how expertly performed."

As we understand appellants' contention, it is that Mr. Karp was not told about the number of animals tested or the results of those tests; that he was not told there was a chance of permanent injury to his body by the mechanical heart, that complete, renal shutdown could result from the use of the prosthesis, that the device was "completely experimental"; and that Dr. Cooley failed to tell Mr. Karp that Dr. Beazley had said Mr. Karp was not a suitable candidate for surgery. Nine physicians testified, but none

suggested a standard of disclosure required by Texas law under these circumstances. Appellants argue Dr. Cooley himself set the standard requiring the disclosure of Dr. Beazley's evaluation. Texas law does permit the defendant doctor to establish the standard of disclosure, Wilson v. Scott, *supra*, 412 S.W.2d at 303, but Dr. Cooley's testimony says no more than that what is a reasonable medical practice is a question of medical judgment. Dr. Cooley's admitted failure to tell Mr. Karp of Dr. Beazley's March 6 notation is of no import; Dr. Leachman testified he did not think the notation made any difference; the March 6 notation, made during the course of an initial evaluation, was in Dr. Beazley's view not a medical opinion but a reservation about the psychological or emotional acceptance of less than a perfect result. See note 5 *supra*.

[11] What is missing from the evidence presented is the requisite expert testimony as to *what* risks under these circumstances a physician should disclose. Anderson v. Hooker, Tex. Civ. App. (writ ref'd n.r.e.). 1967, 420 S.W.2d 235.

[12, 13] Appellants' principal reliance for both the informed consent and fraud issues is the testimony of Mrs. Karp of what she was and was not told. Consent of the wife for the husband's operation has no significance under Texas law unless the person is legally authorized to give such consent, a proposition having no support in the record. The relationship of husband and wife does not itself create such a legal authorization. Gravis v. Physicians and Surgeons Hospital, Tex. 1968, 427 S.W.2d 310, 311. What is significant then is what Mr. Karp was told, and Mrs. Karp's testimony is relevant only to the extent that it evidences what Mr. Karp was told when she was present. Dr. Cooley's undisputed testimony is that he began

discussing with Mr. Karp the proposed wedge excision and the alternative procedure of a mechanical heart as a stop-gap to a transplant about a week before the April 4 operation. He said he next talked with Mr. Karp the evening of April 2. The consent form was prepared on April 3 and although there is a dispute as to *when* it was signed, there is no question it was signed by Mr. Karp. Thus it was against the backdrop of at least two conversations with Dr. Cooley, at which Mrs. Karp was not present, that Mr. Karp was presented and signed the consent document. The consent form is consistent with Dr. Cooley's testimony of what he told Mr. Karp. Although not necessarily conclusive, what Haskell Karp consented to and was told is best evidenced by this document. *See* Drummond v. Hodges, Tex. Civ. App. (no writ), 1967, 417 S.W.2d 740; Goodnight v. Phillips, Tex. Civ. App. (writ ref'd n.r.e.), 1970, 458 S.W.2d 196, 200. It is of considerable import that each step of the three-stage operation, objected to due to an alleged lack of informed consent, was specifically set out in the consent document signed by the patient. *See* the text of the consent document note (4) *supra.*

Appellants have not introduced evidence required by Texas law to show a lack of Karp's informed consent or of breach of Dr. Cooley's duty to adequately apprise Karp of the nature and risks of the operation that warrant, when tested by Boeing v. Shipman, 5 Cir. (en banc), 1965, 411 F.2d 365, 374, submission of this issue to the jury.

[14, 15] A second important reason to affirm the directed verdict on the issue of informed consent here is the absence of substantial evidence on the requisite causal connection between the lack of informed con-

sent and harm. Appellants assert that in Martisek v. Ainsworth, Tex. Civ. App. (writ ref'd n.r.e.), 1970, 459 S.W.2d 679, Texas, "adopted the theory that 'general experience and common sense' enable laymen to determine the causal relationship between the failure to advise a patient of a risk involved in medical treatment and injury resulting from the failure to be informed." *Martisek* was subsequently distinguished on its facts[15] in Conrey v. McGehee, Tex. Civ. App. (writ ref'd n.r.e.), 1971, 473 S.W.2d 617, where the court said that while laymen could arguably ascertain a causal relationship between a failure to warn and subsequent back injuries from lifting heavy objects, common knowledge and experience could not relate the cutting of one of six tendon sutures to a subsequent malfunction of the extensor mechanism in a finger. A similar observation is logical here. Medical complexity is related to the need for expert testimony. *See also* Bell v. Umstattd, Tex. Civ. App. (writ dism'd), 1966. 401 S.W.2d 306, 311. When the only medical expert in a malpractice case, where expert testimony is, as here, the *sine qua non,* is of the opinion that the defendant's treatment was not a proximate cause of the injury complained of, and there is no expert opinion to the contrary, a directed verdict for the defendants is proper. Conrey v. McGehee, *supra,* 473 S.W.2d at 621.

[16] In the instant case it is difficult to determine exactly what injury appellants complain of as resulting

15. *Conrey* observes that *Martisek* relied on Lenger v. Physician's General Hosp., Inc., Tex., 1970, 455 S.W.2d 703, which also involved compression fractures in the back and a physician's failure to warn against hard labor. Subsequent back injuries from lifting heavy objects could perhaps be causally related to the doctor's failure to warn.

from a lack of informed consent.[16] Although not particularly well-developed in Texas cases, other jurisdictions have held (1) that an unrevealed risk that should have been made known must materialize; (2) the unrevealed risk must be harmful to the patient; and (3) causality exists only when disclosure of significant risks incidental to treatment would have resulted in the patient's decision against it.[17]

The only expert testimony was that Mr. Karp was near death prior to the wedge excision operation. Mrs. Karp says she does not complain of the informed consent for the wedge excision. The only expert testimony was that death was also imminent after the wedge excision. There is no expert evidence that says as a reasonable medical probability the mechanical heart caused Karp's death. The expert testimony at best links the mechanical heart as only one of the "possible" but less likely causes of the secondary cause of death, renal failure. *See* Bender v. Dingwerth, 5 Cir., 1970, 425 F.2d 378, 381; Webb v. Jorns, Tex., 1972, 488 S.W.2d 407, 411.

Finally, there is no proof that Mr. Karp would *not*

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16. Appellant's theory suggests that Mr. Karp was given the mechanical heart and subsequently died; therefore a causal link. Appellants imply Mr. Karp's secondary cause of death, renal failure, was proximately caused by the mechanical heart implant. As discussed herein, the medical evidence does not support this theory.

17. *E.g.*, Canterbury v. Spence, 1972, 150 U.S.App.D.C. 263, 464 F.2d 772, 790 and n. 103. *See generally* Note, Informed Consent—A Proposed Standard for Medical Disclosure, 48 N.Y.U.L.Rev. 548, 549 (and cases cited). One commentator has observed these elements were suggested by the Missouri Court in Aiken v. Clary, Mo., 1965, 396 S.W.2d 668, 676, the case that was the principal authority for the leading Texas decision. Wilson v. Scott, Tex., 412 S.W.2d 299, 301-304. Waltz & Scheuneman, 1970, Informed Consent to Therapy, 64 Nw.U.L.Rev. 628, 647 n. 74.

have consented to the operative procedure had the alleged undisclosed material risks been disclosed.[18]

[17, 18] Appellants failed to produce substantial evidence establishing a medical standard as to what disclosures should have been made to Mr. Karp, any violation of that standard, or causation. Thus, the trial court properly directed a verdict for defendants[19] on the informed consent question.

## FRAUD

[19, 20] The district court accurately posited the elements of fraud under Texas law, 349 F. Supp. at 837. The trial court concluded that there was neither substantial evidence under Boeing v. Shipman, *supra*, to raise a fact issue for the jury on fraudulent representations, promises or opinions, nor evidence of proximate causation from the alleged representations and Mr. Karp's death. *Id.* at 838. We need not decide the sufficiency of Mrs. Karp's testimony to raise the factual issue of fraud for the jury, since the final element of proximate causation could not be proven by Mrs. Karp's testimony

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18. Texas courts have not reached the question whether this causal element is measured objectively or subjectively. The better reasoned rule and the general rule is that this is measured objectively. *E. g.*, Canterbury v. Spence, 1972, 150 U.S.App.D.C. 263, 464 F.2d 772, 791; Waltz & Scheuneman, Informed Consent to Therapy, 1970, 64 Nw.U.L.Rev. 628, 647-648.

19. As to both the informed consent and fraud issues, Dr. Liotta, the assistant surgeon and the developer of the prosthetic device, was entitled to a directed verdict for even further reasons. As to fraud, no evidence was presented that Dr. Liotta made any representations, explanations, assertions, or assurances of any kind to Mr. or Mrs. Karp. Furthermore, the Texas authorities have established that team members of a surgical unit are entitled to rely on the consent obtained by the doctor in charge of the operation. Weiser v. Hampton, Tex.Civ.App. (writ ref'd n.r.e.), 1969, 445 S.W.2d 224, 230-231; Bell v. Umstattd, Tex.Civ.App. (writ dism'd), 1966, 401 S.W.2d 306, 313.

and was not evidenced according to Texas standards, Bender v. Dingwerth, 5 Cir., 1970, 425 F.2d 378, 381. See Allison v. Blewett, Tex. Civ. App. (writ ref'd n.r.e.), 1961, 348 S.W.2d 182; Thomas v. Beckering, Tex. Civ. App. (writ ref'd n.r.e.), 1965, 391 S.W.2d 771. The district court properly directed a verdict on the fraud counts for defendants.[20]

## NEGLIGENCE—THE SURGERY

[21-24] To meet the proper standard of medical care, the physician must possess a reasonable degree of skill and exercise this skill with ordinary care and diligence.[21] A specialist like Dr. Cooley is bound to exercise the degree of skill and knowledge that is ordinarily possessed by similar specialists. King v. Flamm, Tex. 1969, 442 S.W.2d 679, 681. As with the doctrine of informed consent, *supra,* plaintiffs are obligated under Texas law to produce expert medical testimony to establish a medical standard of conduct, deviation from that standard and proximate cause, see Wilson v. Scott, *supra.* Appellants again assert Dr. Cooley testified to the established standard and that he did not meet it. The apparent theory is that Dr. Cooley was negligent in proceeding with the wedge resection when he said it could not be beneficial. This language, however, can not be considered alone as a standard, even if it were construed to be one; rather, it must be read in the context of his total testimony, which in no wise establishes negligence. Appellants also failed to raise a fact issue on the proximate cause question. *See* Hart v. Van Zandt, Tex. 1966, 399 S.W.2d 791.

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20. See note (19) *supra,* as to Dr. Liotta.

21. Wilson v. Scott, Tex. 1967, 412 S.W.2d 299, 301-302; Graham v. Gautier, 1858, 21 Tex. 111, 119. *See* Perdue, The Law of Texas Medical Malpractice, 1973, 11 Hous.L.Rev. 1, 22.

*See* discussion of proximate cause under informed consent, *supra*. Since the expert testimony failed to evidence that there were negligent acts or omissions by defendants or that any of their acts or omissions were a proximate cause of Mr. Karp's death, a directed verdict for both defendants was proper.

## EXPERIMENTATION

Appellants contend that the trial court erred in directing a verdict on the issue of experimentation. They acknowledge that no Texas case has expressly dealt with a cause of action based on experimentation, but assert that our court's decision in Bender v. Dingwerth, 5 Cir., 1970, 425 F.2d 378, suggests that the decision as to what is actionable experimentation should be left to a jury. We do not agree.

[25-28] A Texas court bound in traditional malpractice actions to expert medical testimony to determine how a reasonably careful and prudent physician would have acted under the same or similar circumstances, e. g., King v. Flamm, Tex., 1969, 442 S.W.2d 679, 681; Snow v. Bond, Tex. 1969, 438 S.W.2d 549, 550-551, would not likely vary that evidentiary requirement for an experimentation charge. This conclusion is also suggested by the few reported cases where experimentation has been recognized as a separate basis of liability.[22] The record contains no

22. *See* Salgo v. Leland Stanford Univ. Bd. of Trustees, 1957, 154 Cal.App.2d 560, 577, 317 P.2d 170; Fortner v. Koch, 1935, 272 Mich. 273, 261 N.W. 762; Owens v. McCleary, 1926, 313 Mo. 213, 223, 281 S.W. 682, 685; Carpenter v. Blake, 1872, 60 Barb. (N.Y.) 488, rev'd on other grounds, 50 N.Y. 696. *See generally* Perdue, The Law of Texas Medical Malpractice, 1973, 11 Hous.L.Rev. 1, 21; Kusanovich, Medical Malpractice Liability and the Organ Transplant, 1971, 5 U. San Fran.L.Rev. 223, 272-276; Comment, Liability and the Heart Transplant, 1968, 6 Hous.L.Rev. 85, 109; Comment, Human Experimentation, 967, 20 Stan.L.Rev. 99, 100-102.

evidence that Mr. Karp's treatment was other than therapeutic and we agree that in this context an action for experimentation must be measured by traditional malpractice evidentiary standards. Whether there was informed consent is necessarily linked to the charge of experimentation,[23] and Mr. Karp's consent was expressly to all three stages of the operation actually performed—each an alternative in the event of a preceding failure. As previously discussed, appellants have not shown an absence of Mr. Karp's informed consent. Causation and proximate cause are also requisite to an actionable claim of experimentation.[24] Even if Dr. DeBakey's testimony, as discussed subsequently, were admitted and did establish a standard and a departure from that standard in using this prosthetic device, substantial evidence as required by *Boeing, supra,* on causation and proximate cause simply is not reflected in the record. That alone would warrant the directed verdict on this issue.

## DR. MICHAEL DeBAKEY

Appellants assign as error the in-chambers interrogation of Baylor Medical School president, Dr. Michael DeBakey, also a thoracic surgeon, and the refusal of the trial court to allow Dr. DeBakey to testify in open court. Appellants contend his testimony would have been relevant on the issues of informed consent and experimentation. The

23. See articles cited *supra* note (22). Many of the cases traditionally identified as "informed consent" cases have involved use of novel or new medical techniques. *E.g.,* Natanson v. Kline, 1960, 186 Kan. 393, 350 P.2d 1093, rehearing denied, 187 Kan. 186, 354 P.2d 670. Some commentators have suggested that the duty to preinform is viewed more strictly when a novel or radical medical procedure is involved. *See* Comment, 1970 Wisc.L.Rev. 879, 890 n. 69; C. Wasmuth, Law for the Physician 234 (1960).

24. See cases and articles cited *supra* note (22).

district court based its exclusion of Dr. DeBakey on his unwillingness to testify as appellants' expert, his continued assertion of a lack of knowledge of the Karp case and Karp's prosthetic device, and the court's belief it lacked authority to compel expert testimony. The court also said that Dr. DeBakey's testimony would create a highly inflammatory and prejudicial situation "serving no useful purpose." 349 F.Supp. at 836.

[29] The trial court properly exercised its discretion to consider the admissibility and relevance of Dr. DeBakey's testimony out of the jury's presence. *Cf.* L'Etoile v. Director of Public Works, 1959, 89 R.I. 394, 153 A.2d 173; 5 Moore's Federal Practice, § 43.11, at 1383 (1974). The need for an in-chambers interrogation is less clear, although the trial court said the purpose was to minimize the increasing publicity of the trial, and to protect the jury. We have reviewed Dr. DeBakey's deposition and the in-chambers proceedings.[25] We do not agree that there was "judicial coercion" of Dr. DeBakey. Dr. DeBakey's deposition and in-chambers testimony are consistent, and his position desiring not to testify as appellant's expert is constant.

[30] The rule is well-settled that the standard of appellate review in federal courts is whether the exclusion or admission of expert evidence was clearly or manifestly erroneous. Faircloth v. Lamb-Grays Harbor Co., Inc., 5 Cir., 1972, 467 F.2d 685; Eastburn v. Ford Motor Co., 5 Cir., 1972, 471 F.2d 21; Crawford v. Worth, 5 Cir., 1971, 447 F.2d 738. *See* Salem v. United States Lines Co., 1962, 370 U.S. 31, 82 S.Ct. 1119, 8 L.Ed.2d 313.

25. Appellees argue that the trial court only based its decision on the in-chambers interrogation, and that the deposition was not offered. It is clear that both the deposition and testimony were considered by the court in making its ruling.

As explained in Bridger v. Union Railway Co., 6 Cir., 1966, 355 F.2d 382, 387:

> "The trial judge's discretion is necessarily broad for he sits in the arena of litigation. He knows from the pleadings the contentions of the parties, the direction which the case will take, and from his experience can predict, as the evidence unfolds before him, the problems with which the jury must wrestle. From his exposure to the peculiar circumstances of a particular case, he is best suited to answer Professor Wigmore's determinative question: 'On *this subject* can a jury from *this person* receive appreicable help?' 7 Wigmore, Evidence 21 (3rd Ed. 1940)."

This rule is particularly apropos in a diversity case where the requisite proof for the causes of action alleged is so stringently governed by Texas substantive law. *Cf.* Zajicek v. United Fruit Co., 5 Cir., 1972, 459 F.2d 395, 402-403; 1A Moore's Federal Practice § 0.309[2], at 3330 (1965).

[31] We cannot conclude that the trial court's decision to exclude Dr. DeBakey's testimony was clearly erroneous. His testimony would have shown at most that, in his opinion, *the* pump tested under his supervision was not ready for use in humans and that he would not have recommended its use.[26] He may have demonstrated that

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26. The Texas authorities are in apparent conflict as to the "form" expert testimony should take in medical malpractice cases and whether a statement by one physician that he would have done or not done something different meets the evidentiary requirements. *Compare* Daniels v. Finney, Tex.Civ.App. (writ ref'd n.r.e.), 1953, 262 S.W.2d 431, *with* Levine v. Carrell, Tex.Civ.App. (no writ), 1934, 68 S.W.2d 259. See also Bender v. Dingwerth, 5 Cir., 1970, 425 F.2d 378, 385; Snow v. Bond, Tex.1969, 438 S.W.2d 549. Dr. DeBakey refused to answer whether it was bad medical practice in 1969 to put a mechanical heart in a human being, although he qualified this to subsequently say that in a "broad, general sense" it would not be "acceptable"

the animals tested with a prosthetic device at Baylor died of renal failure, but he refused to state that the prosthetic heart used in those experiments was the reasonable medical probable cause of the renal failure. He repeatedly declined to give an opinion regarding *the* pump used in Mr. Karp stating only that the Karp pump was similar to the ones developed under his supervision.[27] He declined to answer the only hypothetical question propounded, even though he had examined at the court's request Karp's medical records, since he had not personally examined Mr. Karp. While it is conceivable that relevance *might* have been established between Dr. DeBakey's experiments and conclusions regarding his mechanical heart and the Karp device and its use, the record does not supply the link. Further, because of the absence of evidence on proximate cause on the informed consent and experimentation issues, Dr. DeBakey's testimony, even if admitted, would not change the requirement as tested by Boeing v. Shipman, *supra,* to direct a verdict for defendants. We therefore do not disturb the trial court's determination.

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["acceptable" was appellants' counsel's word choice] practice to use such a device "on the basis of one experimental observation." He also said he could not say what would happen if the device was used in human beings.

27. Dr. DeBakey said Karp's pump was "similar" to the pumps developed under his supervision, but said he could not speak about the use of it in Mr. Karp because he was not there. Ms. Anderson, the lab technician, testified as to certain changes in the pumps developed at Baylor near the time of the Karp surgery, and Dr. Cooley testified the Karp pump was biventricular, supporting 100 per cent circulation while Dr. DeBakey's pumps were univentricular, supporting only 30 per cent circulation. The record reflects no other testimony on the relevance of Dr. DeBakey's pump experiments and Dr. Cooley's pump inserted in Mr. Karp. Appellants had the burden of showing the relevance of Dr. DeBakey's experiments, and the record does not indicate this burden was met.

## BAYLOR RECORDS

[32, 33] Appellants complain of the trial court's exclusion of reports and documents of a Baylor University College Investigating Committee of the Karp operation. Through its attorneys, Baylor in this action has consistently asserted a privilege conferred by Article 4447d(3), Vernon's Annotated Civil Statutes (1969), which protects from subpoena "the records and proceedings" of any medical organization. Federal courts exercising diversity jurisdiction generally recognize state created privileges. Hyde Construction Co. v. Koehring Co., 5 Cir., 1972, 455 F.2d 337, 340. *See* 9 Wright & Miller, Fed. Prac. & Proc. ch. 7, § 2408, at 330-336 (1971). The trial court reasonably concluded this statute protected these documents. The court also examined the documents *in camera.* Appellants submit the documents would impeach defendants, but the record reflects the documents consist only of a "draft" of a report prepared by the committee's counsel and summaries of statements from witnesses appearing before the committee. Given the asserted state privilege the trial judge ruled applicable, *see* 1A Moore's Federal Practice, § 0.309[2], at 3330 (1965), and the doubtful probative value considering the documents' nature, the court's ruling should not be disturbed.

[34] Appellants' final assignment of error is the trial court's exclusion of a motion picture film showing portions of the Karp operation. No abuse of discretion has been shown. *See* Meadows & Walker Drilling Co. v. Phillips Petroleum Co., 5 Cir., 1969, 417 F.2d 378, 382.

For the foregoing reasons, the judgment of the district court is affirmed.

(June 11, 1974)

Before BELL, THORNBERRY and DYER,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

## APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 71-H-369

(Filed October 18, 1972)

SHIRLEY KARP, Individually, as Executor of the Estate of Haskell Karp, and as next of friend of Joel Karp and Martin Karp, Minors, and Harry Michael Karp.

v.

DENTON A. COOLEY, DOMINGO S. LIOTTA, SAM CALVIN, and ST. LUKE'S EPISCOPAL HOSPITAL

### ORDER

After nine days of trial in the above-captioned malpractice suit based on diversity jurisdiction, the joint motion of defendants Cooley and Liotta for a directed verdict was granted. Fed. R. Civ. P. 50(a). The granting of said directed verdict is based on the following facts and conclusions.

Haskell Karp had a medical history revealing past coronary problems. He had scarlet fever at the age of fifteen. In 1959, at the age of thirty-seven, he had his first heart attack and was hospitalized approximately two months because of diffuse anterior myocardial infarction. In 1961, he began to have episodes of ventricular extra-

systoles and was placed on Quinidine. In 1963, he suffered another episode of severe chest pains. In 1966, he had a second acute myocardian infarction on the diaphragmatic surface. After 1966, Mr. Karp had four or five other episodes of infarction or possibly coronary insufficiency. Several times he was hospitalized with severe chest pains but with no EKG or enzyme changes. In April, 1968, he had a syncopal episode and subsequently had an implantation of a Demand pacemaker (heart pacer) placed transvenously into the right ventricle. In September, 1968, he had begun to have episodes of dyspnea, orthopnea, paroxysmal noctural dyspnea and developed congestive heart failure. Because of this his pacemaker rate was increased to 72 beats per minute. In spite of this action, he developed heart failure, complained of angina, dyspnea on exertion and edema. Selective cine coronary arteriograms revealed that he had severe three vessel disease, occluded right coronary and also his anterior descending and circumflex branches were occluded somewhat distally. Cardiac catheterization confirmed the fact that he had moderate pulmonary hypertension. A left ventricular cine angiogram showed the presence of an adynamic area in the left lateral wall of the left ventricle. At this point in Mr. Karp's medical history, his Chicago, Illinois, physicians referred him to Dr. Denton Cooley in Houston, Texas, for further treatment and consideration of resection of the adynamic or fibrotic area of the myocardium.

Accordingly, on Monday, March 3, 1969, Mrs. Karp telephoned Dr. Cooley long-distance to set a day when he might see Mr. Karp. Two days later, Wednesday, March 5, 1969, Haskell Karp, 47, accompanied by his wife, was admitted into St. Luke's Episcopal Hospital,

Houston, Texas. Upon admission, Mr. Karp signed (as was later established at trial by a handwriting expert) an authorization for medical and/or surgical treatment (Tr. Ex. 1) which reads:

> "I hereby authorize the physician or physicians in charge of Haskell (None) Karp to administer any treatment; or to administer such anesthetics; and perform such operations as may be deemed necessary or advisable in the diagnosis and treatment of this patient.
>
> Signed /s/ HASKELL KARP"
>
> Date 3/5/69
> Witness /s/ WAUNETA F. TAPPAN

Mr. Karp remained as a patient in the hospital for several weeks being examined and treated by several doctors associated with the hospital. During this period of time, Dr. Cooley suggested that Mr. Karp's desire for a more active and productive life-style could best be achieved by a heart transplant. Mr. Karp rejected this suggestion and preferred to undergo ventriculoplasty surgery (wedge procedure) which Dr. Cooley had developed. (All rights under the Dead Man's Statute have been waived.) This surgery necessitates the excision of part of the diseased tissues in the left ventricle in order that the remaining tissue and heart muscle can function at its optimal level.

As regards the informed consent issue, Dr. Cooley testified that he discussed various aspects of the surgery in question with Mr. Karp on at least three occasions: once the week before April 4, again at 10:30 p.m. on the night of April 2, and a brief chat on April 3. According to Dr. Cooley's testimony, of these the most significant was that of April 2. On that occasion, Dr. Cooley ex-

plained to Mr. Karp that the ventriculoplasty surgery could be performed on Friday, April 4, 1969. Dr. Cooley testified he explained the risks, grave dangers and backup procedures involved therein. Further, he explained to Mr. Karp that there was a "70-30" chance of his surviving the ventriculoplasty operation. Dr. Cooley explained, as was stated in the written consent form, that if death appeared imminent that his heart would be removed and a mechanical heart substitute (sometimes referred to as the Cooley-Liotta mechanical heart) inserted. Dr. Cooley testified that he told Mr. Karp the mechanical heart substitute would not be permanent but would be replaced as soon as possible by a human heart transplant, but that at that time there was no heart donor available, nor any prospect of one. Dr. Cooley also testified that he promised Mr. Karp he would do all that is humanly possible to insure his well-being and improve his patient's, that is, Mr. Karp's condition. At that time, Mr. Karp gave him his verbal consent to the surgery.

Mrs. Karp testified that if Dr. Cooley did see her husband that evening (April 2, 1969) that it would have to have been very late for she usually stayed until after 10:00 p.m. with her husband. However, she also testified that on the night in question she went out to dinner at a friend's home late in the evening and did not return to the hospital that night until after this dinner and visit.

Rabbi Wilkin, a Jewish chaplain for the medical center who had been calling on Mr. Karp daily since his admission to the hospital, testified that on one of the days during the week of the surgery (week beginning Monday, March 31, 1969) Mr. Karp had an urgent message sent to him to come to his room. The Rabbi went to his room where he found Mr. Karp alone. Mr. Karp related to the

Rabbi the news that he was to be operated on and discussed with the Rabbi the chances of his surviving such surgery as well as the back-up procedures and the fact that he would be the first human recipient of the mechanical heart substitute if the wedge procedure failed. There was no testimony given at the trial to refute Rabbi Wilkin's statements as to his conversations with Mr. Karp.

Mrs. Karp testified that the first time she heard about the impending surgery that had been scheduled was from her husband on Thursday morning, April 3. She also stated that Dr. Cooley came to her husband's room Thursday evening and told both of them that Mr. Karp's condition had taken a turn for the worse and if surgery was not done soon Mr. Karp would die of a "burst aneurysm." Mrs. Karp felt that Dr. Cooley was insistent and very impatient for Mr. Karp to sign the specially prepared surgical consent and to be on his way. She further testified that she did not fully understand the risks involved in the various procedures; however, she did remember specifically asking Dr. Cooley what the words "mechanical cardiac substitute" meant and receiving an explanation.

Dr. Cooley testified that neither good medical standards nor his own personal practice would permit him to tell a patient that his condition was without hope and that he was going to die. Dr. Cooley also stated that his medical opinion, as repeatedly expressed in articles published prior to and subsequent to Mr. Karp's surgery, is that an aneurysm does not burst. He emphatically testified that he could not have stated to the Karps that if surgery was not done soon Mr. Karp would die of a "burst aneurysm."

In regard to Mr. Karp's condition during that first week of April, Dr. Cooley stated that he had determined that Mr. Karp's heart pacer was failing and that, if it began to skip four or five impulses a minute instead of the two or three that it was skipping, Mr. Karp's death would result. This is why the surgery was scheduled with Mr. Karp's consent two days in advance of its actual occurrence.

Mr. Henry C. Reinhard, a St. Luke's Hospital administrator, testified that Thursday, April 3, 1969, he went to Mr. Karp's room where he found Mr. Karp alone and asked him if he had any questions regarding the surgical consent. They chatted for awhile and then Mr. Reinhard left the room. Mr. Reinhard further testified that on the day of surgery, Friday, April 4, 1969, he went to Mr. Karp's room where he found both Mr. and Mrs. Karp present. He asked Mr. Karp if the signature on the following consent form as principal was his true signature wherein Mr. Karp replied affirmatively. Mr. Reinhard then asked Mrs. Karp if the signature as witness on the following consent form was her true signature wherein she replied affirmatively. Having explained to them that he wanted to verify the signatures so that he could place his own name on the form, Mr. Reinhard witnessed, as Mrs. Karp had previously done, the following consent form:

> "I, Haskell Karp, request and authorize Dr. Denton A. Cooley and such other surgeons as he may designate to perform upon me, in St. Luke's Episcopal Hospital of Houston, Texas, cardiac surgery for advanced cardiac decompensation and myocardial insufficiency as a result of numerous coronary occlusions. The risk of this surgery has been explained to

me. In the event cardiac function cannot be restored by excision of destroyed heart muscle and plastic reconstruction of the ventricle and death seems imminent, I authorize Dr. Cooley and his staff to remove my diseased heart and insert a mechanical cardiac substitute. I understand that this mechanical device will not be permanent and ultimately will require replacement by a heart transplant. I realize that this device has been tested in the laboratory but has not been used to sustain a human being and that no assurance of success can be made. I expect the surgeons to exercise every effort to preserve my life through any of these means. No assurance has been made by anyone as to the results that may be obtained.

"I understand that the operating surgeon will be occupied solely with the surgery and that the administration of the anesthetic(s) is an independent function. I hereby request and authorize Dr. Arthur S. Keats, or others he may designate, to administer such anesthetics as he or they may deem advisable.

"I hereby consent to the photographing of the operation to be performed, including appropriate portions of my body, for medical, scientific, and educational purposes.

WITNESSES: Signature /s/ Haskell Karp"
HASKELL KARP

/s/ Mrs. Haskell Karp
Mrs. Haskell Karp (wife)

/s/ Henry C. Reinhard Jr.
Henry C. Reinhard, Jr.

In the early afternoon of April 4, 1969, Mr. Karp was rolled into the hall of the surgical ward. Dr. Arthur S. Keats, the anesthesiologist, passed the patient on his way to the operating room at approximately 1:55 p.m.

Dr. Keats testified that he was alarmed by Mr. Karp's groaning and complaints of shortness of breath. Dr. Keats further testified that after observing Mr. Karp's coloring and profuse sweating it was his medical opinion that Mr. Karp would expire in the hallway if something was not done immediately. Dr. Keats sent word to Dr. Cooley that the operation should begin as soon as possible, and by approximately 1:20 p.m., Mr. Karp was on the heart-lung oxgenator (commonly referred to as the heart-lung bypass machine). This procedure normally takes twice as long to complete, but the doctors testified that the procedures were hurried in an attempt to save Mr. Karp's life.

Dr. Cooley then performed the wedge procedure on Mr. Karp's left ventricle. This surgery revealed that Mr. Karp's heart had extensive scarring and damage. Approximately 35% of the left ventricle was removed. After the surgery had been completed in its normal and customary fashion, the heart began to fibrillate. This was corrected by electrically shocking the heart. However, according to the only medical testimony given on the subject, the strength of the heart's contractions were not sufficient to sustain life in Mr. Karp. Therefore, according to back-up procedures outlined in the written consent form, Dr. Cooley, assisted by Dr. Liotta, removed the heart and implanted the mechanical heart substitute.

Mr. Karp regained consciousness and lived on the mechanical heart substitute for approximately 64 hours. During this period of time Dr. Cooley and Mrs. Karp made public appeals through the news media for a human heart donor. On April 7, 1969, at 6:30 a.m., Mr. Karp underwent surgery to remove the mechanical heart and to replace it with a human heart. His urine output

was low after the first surgery, and after the second, he became anuric despite all measures to reverse the condition. Mr. Karp died on April 8, 1969, at 3:15 p.m.

An autopsy was performed revealing acute bronchopneumonia, primarily in the right lung due to pseudomonas aeruginosa, and there was evidence of tubular necrosis of the kidney with focal fibrin thrombi of the glomeruli. There was evidence of chronic passive congestion of the liver. There was evidence of hemorragic cystitis and terminal gastric hemorrhage. There was splenomegaly with lymphoid depletion and also lymphoid depletion of the lymph nodes. His death was attributed to bronchopneumonia and acute renal failure. (Plaintiffs' Exhibit No. 1)

After Mr. Karp's death, Mrs. Karp returned to her home in Illinois where she wrote numerous laudatory letters about Dr. Cooley and also wrote an outline for a book about her husband's medical experiences. This manuscript told of Mr. Karp's rapidly deteriorating physical condition before surgery and of both Mr. and Mrs. Karp's eagerness for Dr. Cooley to perform surgery on Mr. Karp. Then in the fall of 1969, Mrs. Karp, individually and as Executor of the Estate of Haskell Karp, and their three sons filed suit against Doctors Cooley and Liotta for damages sustained by Mr. Karp and by plaintiffs under the Texas Wrongful Death Statute. Plaintiffs allege among other things: that the consent to the operation was fraudulently obtained; that it was not an "informed consent"; that under the circumstances the defendants were negligent in performing the corrective surgery, implanting the mechanical heart, and submitting the patient to the surgery for inserting the human donor heart; and that by fraudulent deceptive practices Mrs. Karp was used by defendants to secure a human heart donor.

This court, in ruling on a motion for a directed verdict, must be guided by the criteria set forth by the Fifth Circuit, sitting en banc, in *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1965):

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."

In regard to the issue of informed consent, the Texas courts have clearly established the amount of information a doctor needs to impart to a candidate for surgery.

The court in *Anderson v. Hooker,* 420 S.W.2d 235 (Tex. Civ. App. El Paso—1967, N.R.E.) (medical stand-

ard did not require defendant physician to disclose prior to surgery that another patient had had a stroke after such surgery) reviewed the Texas standards:

> "As a generalization, it may be said that every normal human being of adult years has a right to determine what shall be done to his own body, and a patient's consent is thus a necessary prerequisite to any treatment or operation. And to that may be added that one who gives his consent must have such information regarding the consequences as is necessary to form the basis of an intelligent consent. The duty of the physician to furnish the patient with sufficient information to make an intelligent decision—to disclose risks inherent in proposed treatment or surgery—is recognized. Wilson v. Scott, 412 S.W.2d 299 (Tex. Feb. 1967); Gravis v. Physicians & Surgeons Hospital of Alice, Tex. Civ. App., 415 S.W.2d 674 (n.w.h.). One writer has observed that the reported cases present much confusion as to what risks a physician should disclose to his patient before obtaining consent to operate. Vol. 44 Texas Law Review 799, 800. Both of the above-cited cases quote from the recent opinion by the Supreme Court of Missouri in Aiken v. Clary, 396 S.W.2d 668, 674, as follows:
>
> > " 'We have reexamined this question and have concluded that the question of what disclosure of risks incident to proposed treatment should be made in a particular situation involves medical judgment and that expert testimony thereon should be required in malpractice cases involving that issue. The question to be determined by the jury is whether defendant doctor in that particular situation failed to adhere to a standard of reasonable care. These are not matters of common knowledge or within the experience of laymen. Expert medical evidence thereon is just as necessary as is such

testimony on the correctness of the handling in cases involving surgery or treatment. In Fisher v. Wilkinson, Mo., 382 S.W.2d 627, 632, we held: "Without the aid of expert medical testimony in this case a jury could not, without resorting to conjecture and surmise or by setting up an arbitrary standard of their own, determine that defendants failed to exercise their skill and use the care exercised by the ordinarily skillful, careful and prudent physician acting under the same or similar circumstances." And, as we said in Pedigo v. Roseberry, 340 Mo. 724, 736, 102 S.W.2d 600, 607: "Juries should not be thus turned loose and privileged to say, perchance, the method of treating an injury * * * (or an illness) was negligent notwithstanding, for instance, the uncontradicted competent testimony establish(ing) that the uniformly adopted practice of the most skillful surgeons (or physicians) had been followed." The question is not what, regarding the risks involved, the juror would relate to the patient under the same or similar circumstances, or even what a reasonable *man* would relate, but what a reasonable *medical practitioner* would do. Such practitioner would consider the state of the patient's health, the condition of his heart and nervous system, his mental state, and would take into account, among other things, whether the risks involved were mere remote possibilities or something which occurred with some sort of frequency or regularity. This determination involves medical judgment as to whether disclosure of possible risks may have such an adverse effect on the patient as to jeopardize success of the proposed therapy, no matter how expertly performed.'

* * *

". . . in Wilson v. Scott (supra), our Supreme Court held that the plaintiff had the burden to prove by

> expert medical evidence what a reasonable medical practitioner of the same school and same or similar community, under the same or similar circumstances, would have disclosed to his patient about the risks incident to a proposed treatment."

The only testimony presented by doctors from this community in the same or similar school, on the information given to patients about their surgeries in this community did not vary from the criteria just discussed, namely, that each doctor must use his medical judgment as to whether certain disclosures of risks would have an adverse effect on the patient so as to jeopardize the success of the proposed therapy. Dr. Beasley, Dr. Hamaker, Dr. Keats, and Dr. Cooley all testified that it often is advisable to deliberately withhold information from a patient that would unduly distress him. Dr. H. L. Beasley testified that this notation on Mr. Karp's chart on March 7, 1969, "I am not completely sold that this is a candidate for surgery" (Plaintiffs' Exhibit No. 1—Dr. Beasley's handwritten notation of 3-7-69) had reference to Mr. Karp's poor emotional attitude towards his hospitalization. All the medical testimony stated that emotional attitude and depression would affect what they would relate to a patient.

In making the determination of what to tell a patient about his surgery, a doctor must decide on what details he will give. The courts have developed the following approach with regard to details of surgery:

> "Surgical operation may consist of many steps and involve many specialists. It would, indeed, be unreasonable and undesirable to place a burden of full and complete disclosure upon each and every specialist involved as to the specific methods intended

to be used in an operation and all of the possible risks involved in each step of an operation. See Hall v. United States, D.C., 136 F.Supp. 187, affirmed 5 Cir., 234 F.2d 811." *Bell v. Umstattd*, 401 S.W.2d 306, 313 (Tex. Civ. App., Austin—1966, _____) (Not sufficient evidence for a jury question whether anesthesiologist was negligent in inserting endotracheal tube.)

Upon a review of all the evidence produced, it could not be concluded by a jury that Dr. Cooley had violated the medical standard in this community by the information he gave or did not give to Mr. Karp concerning his surgery. Therefore, the defendant Cooley fell within the guidelines set out in *Wilson v. Scott*, 412 S.W.2d 299, 301 (Tex. 1967) (doctor was held to have given patient sufficient information on a stapedectomy):

"Physicians and surgeons have a duty to make a reasonable disclosure to a patient of risks that are incident to medical diagnosis and treatment. This duty is based upon the patient's right to information adequate for him to exercise an informed consent to or refusal of the procedure. Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal.App.2d 560, 317 P.2d 170 (Ct. App. 1957); Bowers v. Talmage, 159 So.2d 888 (Fla. App. 1963); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, on rehearing, 187 Kan. 186, 354 P.2d 670 (1960); 60 Colum.L.Rev. 1193 (1960); Annot. 99 A.L.R.2d 599 (1965). The nature and extent of the disclosure depends upon the medical problem as well as the patient. In some medical procedures the dangers are great; in others they are minimal. See Atkins v. Humes, 110 So.2d 663, 81 A.L.R.2d 590 (Fla. 1959). It has been suggested that some disclosures may so disturb the patient that they serve as hindrances to needed treatment. Patrick v. Sedwick, 391 P.2d 453 (Alaska 1964); Di

> Filippo v. Preston, 53 Del. 539, 173 A.2d 333 (Sup. Ct. 1961); Natanson v. Kline, supra; Lund, The Doctor, The Patient, and The Truth, 19 Tenn.L.Rev. 344 (1946); Smith, Therapeutic Privilege to Withhold Specific Diagnosis from Patient Sick with Serious or Fatal Illness, 19 Tenn.L.Rev. 349 (1946). Certain disclosures in some instances may even be bad medical practice. Aiken v. Clary, 396 S.W.2d 668, 674 (Mo. 1965)."

It must also be considered at this point that the specially prepared consent form did relate some of the detailed information that plaintiffs complain of, i.e., "I realize that this device has been tested in the laboratory but has not been used to sustain a human being and that no assurance of success can be made." Texas law would require that a jury be instructed that Mr. Karp is charged with reading the consent even if in fact he did not. *See Drummond v. Hodges*, 417 S.W.2d 740, 747 (Tex. Civ. App., Dallas—1967, no writ) (plaintiff held to have knowledge even though he said he did not see anything on several papers); *see also Slade v. Phelps*, 446 S.W.2d 931 (Tex. Civ. App., Tyler—1969, no writ).

Under Texas law the jury would also have to have been instructed that Mrs. Karp's consent to the surgery was not required. Indeed, Mrs. Karp could not legally grant consent to surgery to be performed on her husband and, therefore, any information given to her or withheld from her could not have affected the informed consent of her husband. *Gravis v. Physicians & Surgeons Hosp. of Alice*, 427 S.W.2d 310 (Tex. 1968).

Accordingly, as to any issue of informed consent, a verdict must be directed for Dr. Cooley. Because there is no duty upon a surgeon assisting the patient's chief

surgeon to acquire a separate consent form and because the two consent forms signed by Mr. Karp cover Dr. Liotta, also, defendant Liotta would likewise have to receive a directed verdict in his favor.

With regard to the issue of negligence in Texas malpractice cases, the plaintiff has the burden of establishing such negligence by the use of expert medical testimony.

> "It is definitely settled with us that a patient has no cause of action against his doctor for malpractice, either in diagnosis or recognized treatment, unless he proves by a doctor of the same school of practice as the defendant: (1) that the diagnosis or treatment complained of was such as to constitute negligence and (2) that it was a proximate cause of the patient's injuries. Kaster v. Woodson, Tex. Civ. App., 123 S.W.2d 981 (er. ref.)." *Bowles v. Bourdon,* 219 S.W. 2d 779, 782 (Tex., 1949).

In establishing standards of medical criteria through expert testimony, the medical articles plaintiff introduced cannot be evidence of negligence or proximate cause.

> "When a doctor testifies as an expert relative to injuries or diseases he may be asked to identify a given work as a standard authority on the subject involved; and if he so recognizes it, excerpts therefrom may be read not as original evidence but solely to discredit his testimony or to test its weight. Gulf, C. & S. F. Ry. Co. v. Farmer, 102 Tex. 235, 115 S.W. 260 . . ." *Bowles, supra,* at 783.

Plaintiff's counsel consistently argued at trial that one article by Dr. Cooley stated that aneurysms can burst and, therefore, this contradicted Dr. Cooley's testimony that he would never tell a patient his aneurysm would

burst. Plaintiff argues that this would lend some weight to the jury deciding that the defendant had misinformed Mr. Karp or that he was negligent in diagnosing and treating Mr. Karp. Dr. Cooley repeatedly testified that the articles referred to were not articles dealing with the same type of heart condition Mr. Karp suffered from and that the "burst aneurysm" account is credited to another doctor's statement not his [i.e., Dr. Cooley].

No medical expert opinion was given at trial to even suggest that Dr. Cooley or Dr. Liotta was negligent in any way in their diagnosis or surgical technique and that any such alleged negligence was the proximate cause of death. The Texas definition of negligence is failure to use ordinary care, which is use of that degree of care that medical doctors of ordinary knowledge and skill of the same school of practice of this or a similar community would use in the diagnosis, treatment, and surgery of patients under same or similar circumstances. *Leverman v. Cartall,* 393 S.W.2d 931 (Tex. Civ. App. —San Antonio 1965, N.R.E.).

Plaintiffs subpoenaed Dr. Michael DeBakey to testify. Defense counsel argued to the court that the previously publicized alleged friction between this witness and Dr. Cooley would be highly inflammatory and serve no purpose except to introduce issues into the case before the jury that were not properly before the court. Counsel took this position because Dr. DeBakey had indicated at his deposition that he would not give any medical opinion on the Karp case or willingly answer any hypothetical question developed from the Karp case facts. In order to have expert evidence admitted, if not on the expert's personal knowledge or observation, it must be given on hypothetical questions encompassing only fac-

tors which are in evidence. *Powell v. Sanders,* 324 S.W.2d 587 (Tex. Civ. App.—Texarkana 1959, no writ); *Drake v. Walls,* 348 S.W.2d 62 (Tex. Civ. App.—Dallas 1961, writ ref'd, n.r.e.). Therefore, in order to minimize the increasing publicity of the trial, the court had Dr. DeBakey questioned in chambers with all counsel present and a court reporter. The record will amply reveal that Dr. DeBakey had not been employed to give any expert medical opinion; that he would not accept any employment in this case; that he had never examined Mr. Karp; that he had never seen Mr. Karp; that he would refuse to express any medical opinion concerning the treatment of Mr. Karp; that he would not express any medical opinion based upon hypothetical questions even if asked to do so; and in connection with the Cooley-Liotta mechanical heart used in Mr. Karp, he would refuse to express an in-court expert opinion concerning that device. Accordingly, this court concluded that Dr. DeBakey had no evidence of any probative value to present to the jury. Accordingly, to allow the plaintiffs' attorney to call Dr. DeBakey as a witness before the jury under such circumstances would in all reasonable probability result in creating a highly prejudicial and inflammatory situation that would serve no useful purpose.

Dr. DeBakey was served with a subpoena with twenty dollars attached thereto by plaintiffs' attorney. Dr. DeBakey appeared in court and at that time returned the twenty dollars to plaintiffs' attorney. *People v. Thorpe,* 72 N.E.2d 165 (N.Y. 1947). The various rules on compelling an expert to testify, in the absence of statutory provision, are affected by such factors as the nature of the action or proceeding in which the expert is called as a witness, by the nature or subject of the testimony, or

by the status, relationship, or situation of the party by or against whom the testimony is sought. Thus, in some cases, the rule of compulsion has been limited to criminal prosecutions, and has been held not invocable by or on behalf of a private litigant.

In the absence of any statutory provision, this court weighed the factors set out above and determined that Dr. DeBakey could not be compelled to testify. The following remarks from *L'Etoile v. Director of Public Works,* 153 A.2d 173 (R.I. 1959) were instructive in making this determination:

> "A different question, however, is presented on the issue of whether or not Lynch could be required to testify as an expert when not engaged but merely subpoenaed by petitioners for that purpose. The petitioners admit that as an expert any testimony given by Lynch would have been based on his examination of their property made during and pursuant to his employment as an appraiser for the state. We are of the opinion that, on petitioners' subpoena, in the circumstances of the instant case the trial justice did not err in sustaining respondent's objection to the giving of testimony by Lynch as an expert. Pennsylvania Co. for Insurances on Lives and Granting Annuities v. City of Philadelphia, 262 Pa. 439, 105 A. 630, 2 ALR 1573. See Cooper v. Norfolk Redevelopment & Housing Authority, 197 Va. 653, 90 S.E.2d 788, for a comprehensive discussion of the rule.
>
> "The petitioners argue that exclusive of the ruling on Lynch's status as a witness it was error for the trial justice to inquire of the witness and make his decision in the absence of the jury. This argument is clearly without merit. If the ruling of the trial justice was correct, and we are of the opinion that

it was, the inquiry by the court if made in the presence of the jury might well have been prejudicial to respondent. If the ruling had been otherwise the jury would have been recalled and the questioning of the witness by counsel for petitioners would have been conducted in their presence. The inquiry was preliminary procedure and the jury was properly excluded."

The defendants were also charged with fraudulent representations in connection with the written consent executed before Mr. Karp's operation. Fraudulent representations may assume three forms: (1) a false representation concerning a past or existing fact; (2) a promise made with a present intention not to perform; and (3) a statement of an opinion made with the intent to deceive. In order for a representation to be fraudulent, the jury would necessarily have had to find the following elements:

a. Defendants made the representation;

b. The representation was made concerning past or existing facts;

c. The representation was communicated to Haskell Karp in this case. In that connection such representation may be communicated through an individual or individuals who are not parties to the lawsuit;

d. The past or existing facts referred to in (b) above were material to the transaction and susceptible of knowledge on the part of defendants;

e. The representation was false at the time it was made;

f. The representation was made with the intent to induce Haskell Karp to do or refrain from doing some act (i.e., signing the consent);

g. The representation was relied upon by Haskell Karp in that Haskell Karp believed it to be true and was induced to act or refrain from acting thereby and Haskell Karp would not have acted upon or refrained from acting in the absence of such representation. It is not necessary that the defendants knew that such representation was false in order to find that the representation was fraudulent.

h. Haskell Karp suffered damage or injury as a result.

A promise may also amount to a fraudulent representation if the defendants made the promise with the intention, design, and purpose of deceiving and of not performing the promise. In addition, of course, each and all of the elements enumerated in paragraphs a through h, above, must be found by the jury. In the case of such a false promise, the law considers the state of mind of the defendants to constitute an existing fact.

A statement of opinion may also amount to a fraudulent representation. In order for a statement of opinion to amount to a fraudulent representation, the jury must find that the opinion was made with the intention, design, and purpose of deceiving and that the defendants did not believe the opinion so expressed. In addition, of course, each and all of the elements enumerated in paragraphs a through h, above, must be found by the jury. In the case of such a statement of opinion, the law considers the state of mind of defendants to constitute an existing fact.

The evidence produced at trial was not of such quality and weight required by *Boeing v. Shipman, supra,* to raise a fact issue for the jury on fraudulent representations,

promises, or opinions. Likewise, no proximate causation could have been found from any of the alleged representations and Mr. Karp's death.

> "Whether the cause of action be for malpractice or fraud, the element of causation is essential. In the case of fraud, there must be a causal connection between the statement and the damages sustained. Allison v. Blewett, 348 S.W.2d 182 (Tex. Civ. App.); citing Hayden v. Dunlap, 84 S.W.2d 306 (Tex. Civ. App.); 37 C.J.S. Fraud § 42, p. 296; 24 Am. Jur., p. 48, Sec. 218; 13 A.L.R.2d 1; See also Netzel v. Todd, 24 Ohio App. 219, 157 N.E. 405 (Ohio)." *Thomas v. Beckering,* 391 S.W.2d 771 (Tex. Civ. App.—Tyler, 1965).

There was no proof showing that any statement, promise, or opinion made by Dr. Cooley resulted in Haskell Karp's death and, therefore, any injury to plaintiffs. The Fifth Circuit has thoroughly discussed the Texas concept of proximate cause in malpractice suits in the recent case of *Bender v. Dingworth,* 425 F.2d 378, 381 (5th Cir. 1970):

> "The plaintiff's burden is thus the affirmative one to establish that the doctor's negligence is one proximate cause of the injury. We have not been cited to nor have we found a single case in which the plaintiff has the negative burden of disproving every other possible contributing cause of the injury. In approaching this very question the Texas Court of Civil Appeals recently remarked in Rose v. Friddell, Tex. Civ. App. 1967, 423 S.W.2d 658, 664, writ ref'd n.r.e.
>
> > 'We recognize the rule which states that where there are two or more causes which might have produced the injury, for only one of which the defendant is responsible, and there is no

> evidence to show (sic) which cause the injury is actually attributable, a verdict should be directed for the defendant. Bowles v. Bourdon, supra. However, we do not believe the rule goes so far to require the plaintiff to prove causation by direct and positive evidence which excludes every other reasonable hypothesis. It is generally held that evidence which shows reasonable probability that defendant's negligence or want of skill was the proximate cause is sufficient to raise an issue for the jury. 13 A.L.R.2d 28.' "

This same theory of proximate cause would have to have been applied to any issue of malpractice regarding the technical aspects of the surgeries themselves. The Texas law is clear that the court and jury must rely on expert testimony to determine negligence. "There can be no other guide, and where want of skill and attention is not thus shown by expert evidence applied to the facts, there is no evidence of it properly to be submitted to the jury.

> "The burden of proof is on the plaintiff to show that the injury was negligently caused by the defendant and it is not enough to show the injury together with the expert opinion that it might have occurred from the doctor's negligence and from other causes not the fault of the doctor. Such evidence has no tendency to show that negligence did cause the injury. Ewing v. Goode, 78 F. 442, 444 (C.C. Ohio, 1897); Bowles v. Bourdon, 148 Tex. 1, 219 S.W.2d 779 (1949); Porter v. Puryear, 153 Tex. 82, 262 S.W.2d 933 (1954)." *Hart v. Van Zandt,* 399 S.W. 2d 791 (Tex. 1966).

In determining proximate cause, the proof must be beyond a showing of possibility that the injuries arose

from the defendant's negligence or lack of skill, since a jury may not speculate as to the cause of the injury. *See Hart v. Van Zandt,* supra at 793. The Fifth Circuit articulated the confusion in this area which is set out here in a footnote.[1]

In summary, the requirement is to show through testimony of expert medical witnesses of the same school that the doctor's act did in fact cause injury not that it was a sole proximate cause. *See Luna v. Nering,* 426 F.2d 95 (5th Cir. 1970). Since there was no expert evidence that the doctors had performed any act negligently nor that any of their acts were a proximate cause of Mr. Karp's death, a directed verdict for both defendants must

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1. "It is common for a court in stating the rules governing malpractice cases to assert that the plaintiff has not presented a sufficient case to go to the jury if several possible causes for the injury are shown, only one of which is attributable to the doctor, and the evidence does not establish that any of the alleged causes are actually responsible for the injury. Hart v. Van Zandt, *supra;* Bowles v. Bourdon, *supra;* Henderson v. Mason, Tex.Civ.App. 1964, 386 S.W.2d 879; Lenger v. Physician's General Hospital, Tex.Civ.App. 1969, 438 S.W.2d 408. writ granted; Ross v. Fridell, *supra.* The plaintiff's difficulty in these cases, however, is not a failure to show that the doctor's act was the *only* cause of the injury, but rather the failure to prove that there was any causal relationship at all between the doctor's act and the ensuing injury. This difficulty usually occurs because the plaintiff's expert medical witnesses are reluctant to state outright that the defendant's act or any other act was a cause of the resulting injury, preferring as medical men to state that such an act *might* have caused the injury. *See* Small, Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation, 31 Texas L.Rev. 631 (1953). The result is that the plaintiff fails to prove what he must prove in any negligence case—that the act complained of was a proximate cause of the injury. The rule, therefore, is one demanding strict proof of causation in fact; it does *not* demand that the doctor's negligence be the *sole* or *only* proximate cause in order for the plaintiff to recover. It merely requires proof that the doctor's act is in fact *a* cause."

be entered. *See Bowles v. Bourdon,* 219 S.W.2d 779 (Texas 1949).

The attorneys for the defendants are directed to prepare a judgment in accordance with this Order and Memorandum Opinion and have same approved by the attorney for the plaintiffs. Said judgment shall also recite the fact that Sam Calvin and St. Luke's Episcopal Hospital were dismissed from the suit before trial. Such judgment is to be presented to the court for approval and entry on or before two weeks from the date of this Order. This Order shall constitute this court's findings of fact and conclusions of law.

All costs of court are adjudged against plaintiffs.

DONE at Houston, Texas, on this the 18th day of October, 1972.

JOHN V. SINGLETON, JR.
United States District Judge

## APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-369

SHIRLEY KARP, Individually and as Executor of the Estate of HASKELL KARP, and as Next Friend of JOEL KARP and MARTIN KARP, Minors, and HARRY MICHAEL KARP, Plaintiffs

v.

DENTON A. COOLEY and DOMINGO S. LIOTTA, Defendants

(Filed July 6, 1973)

### ORDER

Defendants' motion for delivery of the deposition of Dr. Michael DeBakey and original papers of Baylor College of Medicine which were ordered sealed during trial having been presented to the court, and the court having considered same, is of the opinion that said motion should be granted.

It is ORDERED that the Clerk of the Court deliver to Defendants' counsel the deposition of Dr. Michael DeBakey and the original records of Baylor College of Medicine which were ordered sealed during trial, so that counsel may have them in connection with preparation of briefs. No part of such records or copies thereof are

to be retained by counsel for any purpose except that of this appeal. No part may be reproduced and given to any person except in pursuance of the appeal, and the contents of the records shall not be given out for publication. Upon completion of this use for appeal, the records are to be returned to the Clerk's files.

Upon return such records shall be forwarded to the United States Court of Appeals for the Fifth Circuit as part of the records in this case.

Signed and entered at Houston, Texas, on this the 6th day of July, 1973.

JOHN V. SINGLETON, JR.
United States District Judge

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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NO. 73-2044

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SHIRLEY KARP, Individually, as Executrix of the Estate of Haskell Karp, and as next friend of Joel Karp and Martin Karp, Minors, and Harry Michael Karp,
*Petitioners*

v.

DENTON A. COOLEY AND DOMINGO S. LIOTTA,
*Respondents*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF DENTON A. COOLEY

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Respondent, DENTON A. COOLEY, in opposition to the Petition of SHIRLEY KARP, ET AL, for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit herein would show:

### OPINIONS BELOW

The Opinion of the United States District Court for the Southern District of Texas is reported at 349 F. Supp. 827.

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 493 F.2d 408.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTIONS PRESENTED

I. **Whether there was a misapplication of a state statute making the records and proceedings of a medical organization committee confidential and not available for court subpoena.**

II. **Whether the qualification of a witness out of the presence of the jury and exclusion of his testimony denied due process of law.**

III. **Whether a directed verdict denied rights to trial by jury.**

## STATEMENT OF THE CASE

This Texas diversity action for medical malpractice arose out of the first clinical use of a mechanical heart. The case involves unique facts, not law. The legal issues were decided based upon long-standing Texas precedents except for the holding that in a therapeutic context, an action for experimentation is governed by traditional malpractice standards and requires expert medical testimony. While this question had not been previously addressed by Texas decisions, petitioners do not here complain of this holding which is the only legal question fairly characterized as novel. As is readily apparent from the opinions below, the case turns significantly upon its facts, particu-

larly with regard to the requisite issues of proximate cause necessary to each advanced theory of liability. At the conclusion of all of the evidence, the trial court directed a verdict for the defendants which was affirmed by the Fifth Circuit Court of Appeals.

## ARGUMENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

### I. There was no misapplication of a state statute.

Petitioners have suggested no special and important reasons for review of this case by certiorari and there are none. No important state question has been decided in conflict with Texas law. No question of federal law was urged below or decided. Petitioner's Reasons for Granting a Writ are essentially a verbatim restatement of their Petition for Rehearing to the Fifth Circuit renewing arguments on the relevancy and sufficiency of evidence that have been rejected twice. No constitutional question is necessary for decision or involved.

Petitioner's argument that Article 4447d(3), Texas Revised Civil Statutes Annotated (Supp. 1974), is unconstitutional was not made to the trial court or to the court of appeals in brief, oral argument, or Petition for Rehearing En Banc. See Assignments of Error, 493 F.2d at 411. Absent any attempt whatsoever by petitioners to demonstrate exceptional circumstances referrable either to Mrs. Karp or the public at large, there is no compelling reason for consideration of this argument not pressed or passed on below. *E.g., Duignan v. United States,* 274 U.S. 195 (1927). Previously, it had merely been asserted that the Texas statute had no application to the records[1]

1. The records involved were of a committee appointed by the Board of Trustees of the Baylor College of Medicine to investigate

involved and that portions of the records were admissible for impeachment purposes.

Petitioners urge that the court of appeals misapplied the Texas statute because it was only intended to protect the identity of persons treated with venereal or other communicable diseases. This argument is unmeritorious and presents, at most, only a question of the construction of a local statute rejected by both lower courts, not justifying certiorari review. *E.g., Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944); *MacGregor v. State Mutual Co.,* 315 U.S. 280 (1941). Texas article 4447d(3) is a portion of the statute designed to reduce morbidity and mortality and to sanction and promote candor in peer review of health care administered by physicians and hospitals. It is fairly representative of similar state statutes. *E.g.,* Minnesota Statutes Annotated, §§ 145.61, 145.64 (Supp. 1974). It is apparent that the statute has a broader and more significant purpose than the narrow objective suggested by petitioners since the identity of persons afflicted with venereal disease is given confidential status by other Texas statutes specifically dealing with the venereal disease problem. Texas Revised Civil Statutes Annotated art. 4445, § 8 (Supp. 1974); Texas Revised Civil Statutes Annotated art. 4445c, § 4 (Supp. 1974). The immunity conferred by the statute in question upon

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compliance by the college with guidelines of the National Heart Institute. (Tr. 1081). The records were voluntarily produced by counsel for Baylor College of Medicine pursuant to the Court's request, not pursuant to a subpoena. No subpoena was quashed. Counsel for petitioner suggested that the records be sealed and made available to the Trial Court for the court's inspection. (Tr. 70). This in camera examination made evident that no report had been made by the committee and that what had been produced was a "draft" of the committee's counsel and an unsigned rejected summary of a statement by respondent Cooley. (Tr. 1061, 1063).

those furnishing information to medical committees is further illustrative of the broader purpose of the statute than protecting the identity of communicable disease patients. For these reasons, the lower courts reasonably concluded that the statute protected the documents in question.

Petitioners, without citation of authority, now, for the first time, obliquely suggest that the statute is unconstitutional, presumably as violative of the 14th Amendment. The single supporting reason is that the statute denies "the right to factual testimony", a function of each and every common law or statutory privilege which exists. No constitutional question need be reached, however, because petitioner's argument continues to ignore the rulings of both lower courts, based upon in camera reviews, that the records were inadmissible and of doubtful probative value. There is no constitutional right to introduce inadmissible evidence. It is elementary that petitioners could not have impeached respondent Cooley with a statement made by respondent Liotta. The lower court rulings on the admissibility of the evidence, standing alone, are dispositive of the issue raised by the Baylor Committee Records and accordingly no reason for review is demonstrated. *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959).

Respondent has discovered no decision suggesting that such a statute denies due process of law. So strong is the public policy supporting the confidential nature of such investigations intending to improve public health care, courts have sustained the privileged nature of communications in these proceedings even in the absence of such a statute. In delineating the valid and reasonable purpose

of the privilege, the United States District Court for the District of Columbia stated in *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (1970):

> "Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit. The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not a part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures. The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those participating were to be open to the discovery process. The public interest may be a reason for not permitting inquiry into particular matters by discovery . . . There is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded."

The purpose of article 4447d(3) is eminently reasonable, it was correctly applied by the local court, and the evidentiary ruling on the privileged records was not manifestly erroneous.

## II. There was not a denial of due process in the qualification of Dr. DeBakey and the exclusion of his testimony.

Respondent is uncertain how the action of a federal trial judge in the qualification of a witness and the eventual exclusion of his evidence relates to the deprivation of 14th Amendment rights. First, this reason for certiorari merely calls upon this Court to review evidence and analyze specific facts which two courts below held did not raise a Texas malpractice submission to the jury. There is not even a suggestion that the ill-founded allegations of error relate in any fashion to the public or to other potential litigants so as to justify the exercise of certiorari jurisdiction. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954).

Secondly, there are independent grounds sustaining, indeed necessitating the directed verdict below. Even if Dr. DeBakey's testimony had been admitted, the record simply contained no evidence that the ventriculoplasty, the orthotopic cardiac prosthesis, or the biological transplantation was a proximate cause of injury to or the death of Mr. Karp. 493 F.2d at 423-25. To the contrary, all of the physicians who testified were of the universal opinion that the respondent's treatment was not a proximate cause of the death of Mr. Karp. 493 F.2d at 422. The more likely causes of pneumonia and renal shutdown resulting in the patient's death were unrelated to the mechanical heart. This evidence compelled a directed verdict under Texas law notwithstanding the testimony of Dr. DeBakey. *Bowles v. Bourdon*, 219 S.W.2d 779, 782 (Tex. 1949).

Thirdly, there was no error in the qualification of the witness or in the exclusion of Dr. DeBakey's testimony.

The trial court's discretion to consider the relevancy and admissibility of evidence outside the presence of the jury is clear. 5 J. Moore, Federal Practice, § 43.11, at 1383 (2d ed. 1974). Conducting the proceedings in chambers dispelled the possibility that jurors would receive inadmissible evidence from lay media reporting. Reviewing the proceedings, the Fifth Circuit rejected the assertion that there was a "judicial coercion"[2] of the witness. 493 F.2d at 424. Nor was the trial court's exclusion of evidence clearly or manifestly erroneous. *Salem v. United States Lines Co.*, 370 U.S. 31 (1962). Dr. DeBakey had no opinions referrable or relevant to Mr. Karp's treatment. After reading Mr. Karp's medical records at the court's suggestion, he answered no hypothetical questions and declined to give opinions on the pump used in Mr. Karp's operation. The authority cited by petitioners in support of the proposition that Dr. DeBakey could be compelled to testify has application only to the situation where an expert witness appears voluntarily at trial and offers expert testimony and then refuses to answer additional questions without compensation. Petitioner's argument, moreover, ignores the fact that this witness did not have an expert opinion[3] which could be compelled by the

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2. Prior to any questions of the witness when judicial coercion was suggested, the court stated:

> "If the record reflects that I have intimated to Dr. DeBakey anything or have indicated one way or the other as to what I will permit him to testify to in front of the jury, then somebody reading the record will have to find it . . . It's a void in the record insofar as I am concerned . . . I have made no determination as to whether or not Dr. DeBakey will be permitted to testify before the jury . . ." (Tr. 1365).

3. (Tr. 1394) "Q. Dr. DeBakey, at this time, sir, if I agree to pay your fee to testify as an expert in this case, would you agree to examine these records and testify as an expert? A. No. I thought I made my position clear about this Judge, and I would like to make it clear again. I made it at the deposition I want to make it here

court. Under this record, there was neither error in exclusion of evidence nor denial of petitioner's rights.

## III. There was not a denial of the right to trial by jury.

Petitioner's third reason for granting the writ is a renewed complaint that the evidence was factually sufficient to raise an issue for jury submission on informed consent or fraud.[4] The assigned error relates only to this cause, is unrelated to the public generally, and as before ignores the fact that the lack of legal causation is an independent ground supporting the trial court's decision. The Texas requirements of a medical standard for disclosure established by expert evidence was not met and a breach of duty not shown. *Wilson v. Scott*, 412 S.W.2d 299 (Tex. 1967). Secondly, the medical evidence did not establish that an unrevealed risk materialized to the patient's harm. *See Canterbury v. Spence*, 464 F.2d 772, 790 (D.C. Cir. 1972). It must be remembered at this point that the undisputed medical evidence established that Mr. Karp faced imminent death prior to any surgery and that his heart would not support life after the conventional repair was performed. Whether measured objectively or sub-

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once and for all. I am not in a position to give expert testimony about Mr. Karp. I do not know Mr. Karp. I never saw him before. I had no observations, clinically, about him. I cannot therefore give expert testimony about a patient I never saw. I know from past experience that reading the records does not provide me with that kind of knowledge. I have read the records of this man and feel the same way I felt before I read the records, that I am not in a position to give expert testimony about what should have been done or not done in that particular patient. The Court: Or whether it was done skillfully or unskillfully? A. I am unable to say."

4. This section of the Petition for Certiorari is a verbatim recitation of the Petition for Rehearing in the Court of Appeals, then submitted under the caption "Informed Consent".

jectively, no evidence was presented to indicate that the patient would not have consented to the operation. Petitioners simply failed to introduce evidence of the requisite elements of a common-law cause of action for informed consent and the trial court's action was accordingly correct and denied no 7th Amendment rights. *Galloway v. United States,* 319 U.S. 372 (1943).

If the cause of action is classified as fraud, there was no showing of any relationship of causation between the absence of a donor heart or any other alleged misrepresentation and any harm to the patient. Absent causation or detriment a substantive cause of action for fraud was not established by Texas standards. *Thomas v. Beckering,* 391 S.W.2d 771 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.); *Allison v. Blewett,* 348 S.W.2d 182 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.).

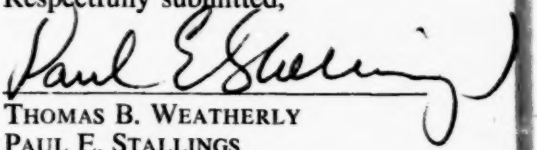
Ultimately, petitioner's reasons for granting a writ may be reduced to questions of relevancy and sufficiency of evidence. Phrasing these issues in constitutional terms does not obscure the fact that in each instance, the trial court's evidentiary rulings were correct and that the decision is additionally sustainable upon independent grounds.

The decision below was clearly correct. Medical science and the unique skills of the surgeons offered a victim of end-stage heart disease two chances at survival, conventional surgical repair and cardiac transplantation. While ultimately unsuccessful, the three staged procedure represents an historic medical effort. The evidence of nine physicians called by petitioners raised no issue of breach of duty or causation. The directed verdict of the trial court was properly affirmed, a fair and just result.

## CONCLUSIONS

For the reasons above stated, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,



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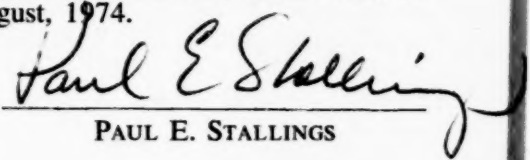
## CERTIFICATE OF SERVICE

True and correct copies of the foregoing brief have been served upon Mr. John H. Holloway, 926 North Wilcrest Drive, Houston, Texas 77024 and Mr. A. J. Watkins, 443 The Main Building, Houston, Texas 77002 on this 16th day of August, 1974.



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